Supreme Court, U.S.
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No. 00-

IN THE

# Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
*Petitioner,*

v.

HOMER DYE, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the Circuit Court of Mingo County, West Virginia**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether it was error for the court below, in conflict with decisions of federal courts of appeals, state supreme courts and prevailing common-law principles, to award emotional-distress damages under the Federal Employers Liability Act ("FELA") to plaintiffs who presented no evidence of physical manifestation or other corroboration of injury related to their alleged fear of cancer?

Whether it was error for the court below, in conflict with decisions of the federal courts of appeals, state supreme courts and evolving common-law principles, not to apportion damages under FELA among tortfeasors?

## LIST OF PARTIES

In addition to the parties listed in the caption, the following were plaintiffs below:

Jack A. Lambert

Leo Thacker

Jethro Darl Walker

Mellington A. Wheeler

## RULE 29.6 STATEMENT

Petitioner Norfolk and Western Railway Company no longer exists as a separate entity and has been merged into the Norfolk Southern Railway Company, the parent of which is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of petitioner's stock.

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IN THE

# Supreme Court of the United States

**No. 00-**

NORFOLK & WESTERN RAILWAY COMPANY,
*Petitioner,*

v.

HOMER DYE, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the Circuit Court of Mingo County, West Virginia**

## PETITION FOR A WRIT OF CERTIORARI

Norfolk & Western Railway Company ("N&W") respectfully petitions this Court to issue a writ of certiorari to the Circuit Court of Mingo County, West Virginia.

## JUDGMENT FOR WHICH REVIEW IS SOUGHT

The consolidated judgments for which review is sought are: *Homer Dye* v. *Norfolk & Western Railway Company*, Civil Action No. 96-C-235; *Jack A. Lambert* v. *Norfolk & Western Railway Company*, Civil Action No. 97-C-98; *Leo Thacker* v. *Norfolk & Western Railway Company*, Civil Action No. 96-C-239; *Jethro Darl Walker* v. *Norfolk & Western Railway Company*, Civil Action No. 96-C-240; and *Mellington A. Wheeler* v. *Norfolk & Western Railway Company*, Civil Action No. 96-C-241. After a jury verdict in favor of the plaintiffs, the Circuit Court of Mingo County denied N&W's Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial and Remittitur on September 23,

1999. The order of the circuit court denying N&W's motion is unpublished, and is reproduced in the Petition Appendix ("Pet. App.") at pages 3a-23a. The Supreme Court of Appeals of West Virginia denied N&W's Petition for Appeal on January 24, 2001. The supreme court's order is unpublished, and is reproduced at Pet. App. 1a-2a.

## JURISDICTION

The order of the Supreme Court of Appeals of West Virginia was entered on January 24, 2001. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS

The relevant provisions of the Federal Employers Liability Act, 45 U.S.C. §§ 51, 53, and 56, are reproduced at Pet. App. 24a-25a.

## STATEMENT OF THE CASE

In *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424 (1997), this Court held that FELA plaintiffs cannot recover damages for emotional distress related to the fear of developing asbestos-related cancer if they could not prove a "physical impact," namely, the onset of a disease caused by asbestos exposure. Turning *Buckley* on its head, and departing from established FELA and common-law principles adopted by other courts of appeals, the court below rendered a $2.3 million judgment against N&W in favor of the five respondents who, while arguably adducing evidence of the requisite "physical impact," presented no objective proof of any emotional injury whatsoever, much less the proof of physical or psychiatric manifestations of emotional injury that the common law has always required of plaintiffs claiming negligently inflicted emotional distress. Instead, the court upheld large judgments to respondents based on their bare

testimony that they were concerned that they would eventually contract cancer from asbestos exposure; it did so even though a number of them expressly disavowed any "fear" of cancer. Compounding the wrong, the court below instructed the jury that, if it found that N&W's conduct caused the respondents' injuries to any degree, it should hold N&W liable for all of their damages, despite the clear presence of other causes independent of their employment with N&W.

This case presents two issues of critical importance to the administration of FELA, and over which the courts are divided, namely: (1) whether a plaintiff can recover emotional-distress damages even without any physical manifestation or other objective medical corroboration of such distress; and (2) whether a railroad is liable for the full amount of an employee's injury on a strict theory of joint and several liability, even though the evolving common law has generally rejected such liability and there is uncontroverted evidence of acts occurring outside the course of his employment with the railroad that likely caused his injuries.

Review of the ruling below is especially critical because the highly coordinated railroad-plaintiff's bar has targeted notoriously pro-plaintiff jurisdictions in West Virginia for massive FELA suits involving out-of-state plaintiffs. Given the absence of any mandatory appellate review in the West Virginia state courts and the generous venue provisions of FELA, the ruling below is likely to be the principal determinant of FELA liability for asbestos-related claims of the major eastern railroads (CSX and Norfolk Southern, the successor of N&W), both of which operate in West Virginia. See *infra* at 26-29. More broadly, the immediate resolution of these issues is vital to the railroad industry, which otherwise faces exactly what the Court has sought to avoid in its recent FELA opinions: significant, unpredictable liability for a flood of unsubstantiated claims of emotional distress.

**Statutory Background**

Congress enacted FELA as a broad remedial statute to ensure relief for injured railroad employees who work under perilous conditions. See *Urie* v. *Thompson*, 337 U.S. 163, 181 (1949). Consistent with its remedial nature, FELA lowers certain common-law hurdles that historically prevented recovery for plaintiffs. For example, FELA reduces the level of causation which employees must demonstrate: "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier . . . ." 45 U.S.C. § 51 (emphasis added). FELA also eliminated the traditional tort defense of contributory negligence. Therefore, an employee's own negligence "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." *Id.* § 53. Employees also have greater flexibility to bring FELA actions in any state or federal district "of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." *Id.* § 56. Moreover, if the plaintiff selects a state forum, defendants may not remove these actions to federal court. See 28 U.S.C. § 1445(a).

Nonetheless, railroad employers are not insurers of an employee's welfare under FELA. See *Inman* v. *Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959). Liability is predicated on proof that the railroad's negligence caused injury to the employee. Absent express statutory departures from the common law, the requisite negligence under FELA is founded on the common-law concepts of negligence "as established and applied in the federal courts." *Urie*, 337 U.S. at 174; see also *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 (1980) ("It has long been settled that questions concerning the measure of damages in an FELA action are federal in

character."). The scope of FELA is "a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws." *Urie*, 337 U.S. at 174. Indeed, one of the purposes of FELA was to "create uniformity throughout the Union" with respect to the financial responsibility of railroads for injuries to their employees. H.R. Rep. No. 60-1386, at 3 (1908). Uniformity is vital in light of the wide latitude FELA plaintiffs have to select a forum. See 45 U.S.C. § 56.

To promote this uniformity, this Court must provide guidance to state and federal courts on issues that are important to the administration of FELA. In the absence of express statutory provisions, the Court accords "great weight" to evolving common-law principles in delineating the unspecified bounds of recovery under FELA. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994). In turn, state courts must apply such federal law rather than relying on their own state law governing ordinary negligence actions. See *Liepelt*, 444 U.S. at 493; *Sabb* v. *Norfolk & Portsmouth Belt Line R.R.*, 278 S.E.2d 795, 797 (Va. 1981).

The text of FELA is mostly silent on the two issues raised in this petition, and thus these are issues to be resolved based on evolving principles of common law adapted to the circumstances of the railroad industry, *Gottshall*, 512 U.S. at 555-56, with due regard for "the general impact, on workers as well as employers, of the general liability rules they would thereby create." *Buckley*, 521 U.S. at 438. First, although this Court has recognized that, in this context, FELA's purpose is to authorize recovery in damages for "a *serious* and negligently caused emotional harm," *id.* at 438 (emphasis added), and has adverted to the majority rule requiring physical manifestations of severe emotional injury, *Atchinson, Topeka & Santa Fe Railway* v. *Buell*, 480 U.S. 557, 567 n.13, 568-69 & n.18 (1987), it has not yet had occasion to adopt that rule expressly in FELA actions. See *Gottshall*, 512 U.S. at 554. Second, this Court has not yet resolved the conflict in

the lower courts over whether FELA permits apportionment of liability among multiple tortfeasors. Both of these questions leave fundamental gaps in FELA doctrine that require immediate resolution.

**Factual Background**

The plaintiffs below, five retired employees of N&W, filed complaints against their former employer under FELA in the Circuit Court of Mingo County, West Virginia. The basis of their complaint was N&W's alleged failure to provide them with a reasonably safe workplace because of their exposure to asbestos and other dusts. The plaintiffs alleged that they had contracted asbestosis, and sought damages for, among other things, a claimed concern about contracting cancer sometime in the future.

At trial, it was contested whether any of the plaintiffs had any asbestos-related condition. The plaintiffs did not present any testimony of treating physicians. Instead, a physician hired to examine the plaintiffs solely for purposes of the litigation testified that there were indications of asbestosis, a set of lung disorders from the inhalation of asbestos dust. The plaintiffs' medical witnesses also testified that the plaintiffs' workplace exposure to asbestos may have caused their asbestosis. They also testified that asbestos exposure is correlated with cancer. Significantly, none of the plaintiffs' witnesses testified that asbestosis itself increases the risk of cancer.

Indeed, other medical evidence at trial established that there are four separate disease processes associated with exposure to asbestos: asbestosis, pleural thickening, malignant mesothelioma (a rare cancer of the lining of the lung cavity), and certain other cancers. Although all these diseases may be associated with the same asbestos exposure, none evolves into the other and there is no established connection among the diseases (*i.e.*, asbestosis does not turn into lung cancer or mesothelioma, nor does lung cancer or mesothelioma become

asbestosis). The association between asbestos exposure and certain cancers, including mesothelioma, is made epidemiologically, and not medically. The fact that asbestosis and asbestos-related cancer are separate diseases that are not medically linked has also been widely recognized among courts. See, *e.g.*, *Jackson* v. *Johns-Manville Sales Corp.*, 727 F.2d 506, 517 (5th Cir. 1984) (asbestosis itself does not lead to an increased risk of cancer); *Pierce* v. *Johns-Manville Sales Corp.*, 464 A.2d 1020, 1025 (Md. 1983) ("asbestosis and lung cancer are separate and distinct latent diseases that are not medically linked").[1]

The parties also disputed whether N&W had been negligent at all, and whether the plaintiffs had had substantial exposure to asbestos during their railroad employment that caused their alleged current conditions. There was extensive testimony that two of the plaintiffs had far more substantial exposure to asbestos fibers during decades of subsequent employment elsewhere. Respondent Mellington Wheeler worked at N&W for only six years in the 1950s, and later worked at a chemical company for 33 years. Wheeler testified at trial that he was not aware of having been exposed to asbestos at N&W, but that he had frequent direct exposure to asbestos at the chemical company. Respondent Leo Thacker testified that he had worked for N&W for eight years in the 1930s and 1940s, and thereafter worked for more than 30 years in construction with frequent exposure to asbestos. The plaintiffs testified as to other contributing factors to their alleged injuries, including smoking up to two packs of cigarettes per day for extended periods of time. The plaintiffs also had concurrently filed separate lawsuits against numerous asbestos manufacturers in another West Virginia county. In those

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[1] *See also Joyce* v. *A.C. & S., Inc.*, 785 F.2d 1200, 1205 (4th Cir. 1986); *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 117 n.33 (D.C. Cir. 1982) (Ginsburg, J.); *Devlin* v. *Johns-Manville Corp.*, 495 A.2d 495, 501 (N.J. Super. Ct. Law Div. 1985); *Eagle-Picher Indus., Inc.* v. *Cox*, 481 So. 2d 517, 522 (Fla. Dist. Ct. App. 1985).

lawsuits, pleadings from which are part of the record below, the plaintiffs alleged that their injuries were "the sole, direct, and proximate result" of the acts and omissions of the manufacturers.

The parties also contested whether any of the plaintiffs had suffered any emotional distress. The plaintiffs testified as to varying degrees of concern about contracting cancer. Respondents Thacker, Wheeler, and Jethro Daryl Walker testified that, at most, they had a "concern" about cancer. Thacker testified, "it'll cross my mind about cancer, but . . . I'm not afraid of any disease." Wheeler testified that he only thought about cancer sometimes when he had trouble breathing in the middle of the night. Respondent Jack Lambert admitted that he had no "fear" of cancer: "No, right now, I'm not afraid of it." Respondent Homer Dye testified that he was more concerned with taking care of his sister than contracting cancer. Indeed, none of the plaintiffs testified as to even having a "fear" of cancer. Furthermore, not only did none of the plaintiffs testify as to the existence of severe emotional injury, but none presented evidence of any emotional or physical manifestation of their concerns, or any other objective corroboration of their bald assertions of emotional distress.

Despite this lack of supporting evidence, the court below denied N&W's motion to exclude all evidence regarding cancer at trial due to its irrelevant and highly prejudicial nature. Throughout the trial and in closing arguments, the plaintiffs' counsel emphasized the need to compensate them for their fear of cancer and future injuries: "That's what you've got to compensate for – the fear of cancer – you know, one of the things we're saying about these guys i[s] they're not totally disabled."

In instructing the jury on damages, the court below instructed the jury that "none of the plaintiffs have offered evidence that he actually has cancer or that he will, with reasonable certainty[,] develop cancer in the future.

Therefore, you cannot award damages to plaintiffs for cancer or for any increased risk of cancer." Pet. App. 36a. Nonetheless, it instructed the jury that "any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering." *Id.* The jury was further instructed to find N&W liable if its negligence "contributed, however slightly, to the plaintiff's injuries," and "not to make a deduction for the contribution of non-railroad exposures." *Id.* at 35a. The jury returned a verdict in favor of the plaintiffs, collectively awarding them $2,280,000 against N&W.

**The Circuit Court Decision**

The court below upheld the jury verdict in favor of the plaintiffs in an order entered on September 23, 1999. Pet. App. 3a. The Circuit Court based its order on limited findings of fact, which referred to the plaintiffs' own testimony of their "fears or concerns about developing cancer" and medical testimony as to the greater risk of developing cancer from asbestos exposure. *Id.* at 4a-5a. In its Conclusions of Law, the court below relied on the plaintiffs' testimony "concerning their distress at learning of their disease and the increased risk of developing cancer." *Id.* at 10a. The court below did not base its conclusion – as it could not – on any other evidence of the plaintiffs' "fear" of cancer. The court below also relied on a recent decision of the Supreme Court of Appeals of West Virginia. See *id.* at 10a-11a (citing *Bower* v. *Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W.Va. 1999)). *Bower*, a non-FELA case, involved a claim for future medical monitoring costs, not negligent infliction of emotional distress.

Second, the court below found no error in its jury instruction that N&W was liable for all damages as long as its negligence caused any portion of the plaintiffs' injuries. The court below found this instruction "compelled by the

language of FELA, the indivisible nature of the Plaintiffs' injuries, and the established doctrine of joint and several liability." Pet App. 18a. The court below also justified its refusal to instruct the jury on contributory negligence related to the plaintiffs' smoking, on the basis that their "occupational diseases could not be caused by cigarette smoking." *Id.* at 19a. The court below made no reference to the impact of the plaintiffs' smoking on their "fear of cancer" claim. Having no right of appellate review (for there are no intermediate appellate courts in the West Virginia state court system), N&W petitioned the West Virginia Supreme Court of Appeals for review, but its petition was denied.

## REASONS FOR GRANTING THE PETITION

There can be no doubt that FELA is a remedial statute for the benefit of injured railroad employees. At the same time, FELA is not intended to transform employers into the "insurers of the emotional well being and mental health of their employees." *Gottshall*, 512 U.S. at 554; see also *Buckley*, 521 U.S. at 438 (courts "must consider the general impact, on workers as well as employers, of the general liability rules they would thereby create"). As the cases below illustrate, the West Virginia courts have crossed the line and greatly expanded the proper recoveries for employees under FELA. Plaintiffs are now able to recover for allegations of emotional distress without presenting any corroborating evidence of any such injury. Moreover, the court has denied apportionment of any of these ever-increasing damages among other tortfeasors, even in cases in which the railroad employer is at best marginally responsible for the employee's injuries. As a result, railroad employers are broadly liable to their employees for health problems arising over the course of their entire lives, and not just their term of employment.

The court below has joined other state and federal courts in adopting these legal standards of liability and apportionment

in conflict with the decisions of other lower courts and principles embodied in this Court's decisions. By resolving this conflict, the Court can ensure that FELA is given the "uniform application throughout the country essential to effectuate its purposes." *Dice* v. *Akron, Canton, & Youngstown R.R.*, 342 U.S. 359, 361 (1952).

## I. THE COURT SHOULD RESOLVE THE CONFLICT OF AUTHORITY AS TO WHETHER FELA PLAINTIFFS MAY RECOVER EMOTIONAL-DISTRESS DAMAGES WITHOUT ANY CORROBORATING MANIFESTATION OF EMOTIONAL INJURY.

Section 1 of FELA states that employers "shall be liable in damages to any person suffering injury." 45 U.S.C. § 51. The statute does not define the term "injury" – much less its specific meaning for claims of negligent infliction of emotional distress. Based on its review of common-law developments, this Court has recognized that emotional distress is a compensable injury under FELA. *Gottshall*, 512 U.S. at 550. In *Gottshall* and *Buckley*, the Court was careful to embrace one common-law limitation, the "zone of danger" test. However, the Court has not directly addressed the other vital common-law limitation on emotional-distress claims: namely, that emotional injury, in order to be compensable, must be corroborated by physical manifestations (or objective medical symptoms) of injury. In conflict with other courts, the court below failed to vindicate this limitation by awarding millions of dollars based solely on the bare, subjective testimony of the plaintiffs regarding their "fear" of cancer.[2] It

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[2] Petitioner does not challenge in this petition the right of the jury to determine whether respondents should be awarded damages for pain and suffering or medical expenses arising from the asbestosis itself (such as the occasional shortness of breath which one of the defendants claimed). Nonetheless, even if those were permissible bases of recovery, the error in instructing the jury that it may award damages for fear of cancer without any physical manifestation of emotional injury requires reversal of the

is imperative that this Court intervene to prevent this unwarranted expansion of FELA liability.

The court below turned a blind eye to sound common-law principles in allowing recovery for uncorroborated emotional injuries. As an initial matter, the court ignored this Court's decision in *Gottshall* in awarding the plaintiffs pain and suffering damages for their "fear of cancer" claims. Pain and suffering "traditionally have been used to describe sensations *stemming directly* from a physical injury or condition." *Gottshall*, 512 U.S. at 544 (internal quotation marks omitted) (emphasis added). The plaintiffs claimed to have contracted only asbestosis, which itself has been widely found not to lead to cancer. See, e.g., *Jackson*, 727 F.2d at 517; *Pierce*, 464 A.2d at 1025. Although the physical injury of asbestosis and the claimed emotional injury of fear of cancer may arise from the same asbestos exposure, fear of cancer is not distress that stems directly from the asbestosis, and therefore it should not be compensable as pain-and-suffering damages from the asbestosis itself. See *Gottshall*, 512 U.S. at 544 (negligent infliction of emotional distress contemplates mental and emotional injury that is "not directly brought about by a physical injury"); *Potter* v. *Firestone Tire & Rubber Co.*, 863 P.2d 795, 805 (Cal. 1993) (characterizing pain-and-suffering damages as "parasitic damages" which compensate "a reasonable fear of a future harm *attributable to the injury*") (emphasis added). As a result, the court below could only have awarded damages for fear of cancer as a form of negligently inflicted emotional distress. See *id.* at 807-08 (analyzing parasitic pain-and-suffering damages as distinct

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entire judgment. *See Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 83 (1919) ("in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless"); *Yazoo & Miss. Valley R.R.* v. *Mullins*, 249 U.S. 531, 533 (1919) (same); *see also United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926).

from claim for nonparasitic damages for emotional distress for asbestos exposure). But regardless of whether damages are awarded as pain and suffering, or as a separate claim for negligent infliction of emotional distress, common-law limits on recovery that are consonant with the purposes of FELA must be observed. *Gottshall*, 512 U.S. at 557; *Smith* v. *Union Pac. R.R.*, 236 F.3d 1168, 1171 (10th Cir. 2000).

### A. FELA Incorporates Common Law Limitations On Emotional-Distress Damages.

The common law long forbade the recovery of emotional-distress damages, a rule said to "'rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation.'" *Southern Express Co.* v. *Byers*, 240 U.S. 612, 615 (1916) (quoting *Cooley on Torts* 94 (3d ed.)). This traditional reluctance derived from the distinctive nature of emotional distress in comparison with physical injuries: (1) it is often temporary and relatively trivial; (2) it is less ascertainable, and therefore more easily falsified or imagined; and (3) it is less apparent, and therefore operates as a more remote consequence of a defendant's action. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 54, at 360-61 (5th ed. 1984); see also *Gottshall*, 512 U.S. at 545. When it finally recognized the tort of negligent infliction of emotional distress, the common law placed severe restrictions on its recovery. Those restrictions were of two kinds. First, the common law limited the kind of conduct that was actionable. See *id.* at 546-49 (describing the three principal tests for actionable conduct as requiring a "physical impact" upon the plaintiff, placement of the plaintiff in a "zone of danger," or endangerment of a "relative bystander"); *Restatement (Second) of Torts* § 436 (1965). Second, the common law restricted the type of negligently inflicted emotional injuries that are compensable, requiring plaintiffs to present some objective evidence of a manifestation of their injuries: "the negligent actor is not liable when his conduct results in the

emotional disturbance alone, without the bodily harm or other compensable damage." *Id.* § 436A & cmt. a; see also *id.* § 436 cmt. d (requiring proof that "the negligent conduct be a substantial fact[or] in bringing about the fright and that the fright also be a substantial factor in bringing about the illness"). Most jurisdictions continue to adhere to the requirement of physical manifestations (or objective, medically diagnosed symptions) of emotional injury as a prerequisite of recovery.[3]

In *Gottshall*, the Court faced the question of whether claims for negligent infliction of emotional distress are cognizable under FELA, and in what circumstances. 512 U.S. at 544. In light of FELA's remedial purpose, the Court interpreted the employee's statutory entitlement to recover for "injury" caused by the railroad's negligence to include emotional injury, for "severe emotional injuries can be just as debilitating as physical injuries." *Id.* at 550 (internal quotation marks omitted). This Court recognized the two major restrictions at common law on emotional-distress damages, noting that "[c]ourts . . . have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries *and on the injuries that may be compensable*." *Id.* at 546 (emphasis added). In *Gotshall*, the second limitation (on the kind of emotional injuries that are compensable) was not in dispute; the two plaintiffs in *Gottshall* had suffered severe and manifest emotional injury,

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[3] Mary Donovan, Comment, *Is The Injury Requirement Obsolete In A Claim For Fear Of Future Consequences?*, 41 UCLA L. Rev. 1337, 1363-68 (1994); *Payton* v. *Abbot Labs*, 437 N.E.2d 171, 174-75 & n.5 (Mass. 1982); *see, e.g.*, *First Nat'l Bank* v. *Drier*, 574 N.W.2d 597, 600 (S.D. 1999); *Beynon* v. *Montgomery Cablevision Ltd. Partnership*, 718 A.2d 1161, 1163 (Md. 1998); *Hegel* v. *McMahon*, 960 P.2d 424, 431 (Wash. 1998); *Leaon* v. *Washington County*, 397 N.W.2d 867, 875 (Minn. 1986); *Barnhill* v. *Davis*, 300 N.W.2d 104, 107-08 (Iowa 1981); *Corso* v. *Merrill*, 406 A.2d 300, 304 (N.H. 1979); *see also Restatement (Second) of Torts* § 436A cmt. c (1965).

including major depression, post-traumatic stress disorder, and a nervous breakdown. See *id.* at 536-37, 539. This Court addressed the second limitation only in the context of rejecting the claim that the genuine-injury requirement obviated the need for the first limitation on the type of conduct that was actionable. It held that "testing for the genuineness of an injury *alone* cannot appreciably diminish the possibility of infinite liability," because without restrictions on the type of conduct giving rise to liability, railroads would have no predictable standards to guide their conduct and damages would be awarded inconsistently. *Id.* at 552 (emphasis added). Accordingly, this Court restricted the kind of conduct that was actionable (and thus the type of plaintiffs who could sue), adopting the "zone of danger" test as the standard most consonant with FELA. *Id.* at 554-56. This Court thus allowed "recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 547-48.

In *Buckley*, the Court elaborated on the meaning of the term "physical impact" in the context of toxic exposure. 521 U.S. at 430. Despite his exposure to asbestos during his employment, Buckley did not allege that he suffered from any asbestos-related disease or exhibited any physical or psychiatric symptoms resulting from his asbestos exposure. The Second Circuit allowed recovery for emotional distress because (1) Buckley presented some objective proof of a injury apart from his own testimony; and (2) Buckley's contact with asbestos constituted a "physical impact." *Buckley* v. *Metro-North Commuter R.R.*, 79 F.3d 1337, 1346 (2d Cir. 1996), *rev'd*, 521 U.S. 424 (1997). This Court addressed only the second ground in reversing the Second Circuit:

> The case before us . . . focuses on the italicized words "physical impact." . . . In our view, however, the

> "physical impact" to which *Gottshall* referred does not include a simple physical contact with a substance that might cause a disease at a substantially later time – where that substance, or related circumstance, threatens no harm other than that disease-related risk.

*Buckley*, 521 U.S. at 430. Other than to reiterate *Gottshall*'s admonition that the test for the genuineness of emotional injury "alone" is insufficient to safeguard defendants from meritless claims, *id.* at 434, and that FELA required additional categorical restrictions on the class of plaintiffs who can sue, the Court in *Buckley* did not address the fundamental requirement that emotional injury be corroborated by some objective manifestation.

The Court has previously acknowledged the importance of this unresolved question in cases decided on alternative grounds. In *Atchinson, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557 (1987), the Court recognized that "severe emotional injury . . . has generally been required to establish liability for purely emotional injury." *Id.* at 567 n.13; see also *id.* at 568-69 & n.18. The Court later noted in *Gottshall* that "[m]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover." 512 U.S. at 549 n.11; see *id.* at 544 ("The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms."). Most recently in *Buckley*, the Court acknowledged its adoption of the "zone of danger" test in reliance on state cases where physical impact "caused, or might have caused, immediate traumatic harm." 521 U.S. at 430.

Justice Ginsburg twice has separately encouraged the resolution of this exact question: "a solution the Court does

not explore . . . would be to require such 'objective medical proof' and to exclude, as too insubstantial to count as 'injury,' claims lacking this proof." *Gottshall*, 512 U.S. at 571 (Ginsburg, J., dissenting). In *Buckley*, Justice Ginsburg found that Buckley's contact with asbestos constituted a "physical impact," but concurred in the denial of recovery "because Buckley did not present objective evidence of severe emotional distress." *Buckley*, 521 U.S. at 445 (Ginsburg, J., concurring in part and dissenting in part). Thus, the Court has yet to address directly this fundamental element of an emotional-distress claim, but it should do so now not only to redress the clear injustice of the judgment below but also to resolve a decisional conflict among the lower courts.

### B. This Court Should Resolve The Conflict Of Authority Over Whether FELA Limits Recovery To Objectively Manifest, Severe Emotional Injury.

Despite the clarity of the common law rule, there is considerable disarray among the courts of appeals and the state courts over what emotional injuries are compensable under FELA. The decision below is in direct conflict with decisions of the First Circuit and state supreme courts that hew to the traditional requirement that emotional injuries are compensable only if manifested in some form. See *Moody* v. *Maine Cent. R.R.*, 823 F.2d 693, 696 (1st Cir. 1987) (rejecting claims of injury "manifested only by subjective pain" and unsupported by "any medical opinion as to causation"); *Bullard* v. *Central Vermont Ry.*, 565 F.2d 193, 197 (1st Cir. 1977) ("If there is to be compensation for nervousness, depression, or other mental conditions . . ., there must be evidence from which a jury can make an informed judgment as to the existence, nature, duration and seriousness of the condition."); *Alabama Great S. R.R.* v. *Jackson*, 587 So.2d 959, 965 (Ala. 1991) (upholding award of damages where "the consequences of th[e] injury caused . . . various physical problems"); *McMillan* v. *National R.R. Passenger Corp.*, 648

A.2d 428, 433 n.3 (D.C. 1994) (FELA plaintiff must show "serious and verifiable" emotional injuries); cf. *Dodge* v. *Cotter Corp.*, 203 F.3d 1190, 1202 (10th Cir.) (requiring, in non-FELA action, evidence of a "chronic objective condition caused by their increased risk of developing cancer to permit their recovery for emotional distress damages"), *cert. denied*, 121 S. Ct. 71 (2000). The decision below is also in conflict with two Fifth Circuit decisions under the Jones Act,[4] the first of which required evidence of "serious mental distress" without addressing the precise nature of injury that would be compensable, *Hagerty* v. *L & L Marine Services, Inc.*, 797 F.2d 256, 256 (5th Cir. 1986), and the second of which upheld dismissal of a claim for intentional infliction of emotional distress because the plaintiff "failed to prove she suffered any physical manifestations of her alleged emotional injury," *Martinez* v. *Bally's Louisiana, Inc.*, No. 00-30119, 2001 WL 237222 (5th Cir. Mar. 26, 2001).

On the other side of the coin, the Second Circuit, although not going so far as the court below, has rejected the requirement of physical injury or medically diagnosed symptons, allowing recovery if there is *any* objective evidence (no matter how thin) corroborating the plaintiff's subjective testimony that asbestos exposure caused him fear and anger (such as a contemporaneous complaint to a supervisor about negligent conduct). *Buckley*, 79 F.3d at 1346, *rev'd on other grounds*, 521 U.S. 424 (1997). In a statute of such importance to railroads and railroad workers alike, with broad venue provisions that invite forum shopping, it is imperative that this Court resolve this conflict and uncertainty now.

The Court is faced not only with considerable conflict and uncertainty on this issue in the federal and state courts, but

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[4] The Jones Act incorporates FELA doctrine, and precedent under one Act governs cases brought under the other. *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 431-32 (1958).

also a serious threat to the important policies underlying its recent restrictions on emotional-distress claims under FELA. In *Gottshall*, the Court adopted the "zone of danger" test in order to prevent "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." 512 U.S. at 557 (internal citation and quotation marks omitted). In *Buckley*, the Court considered these policy goals at length in justifying its further restriction on emotional-distress claims. 521 U.S. at 433-34. Specifically, the Court noted that these policy goals would be eviscerated where, "apart from Buckley's own testimony, there was virtually no evidence of distress." *Id.* at 433. If plaintiffs here are allowed to recover on uncorroborated claims of emotional distress, the Court's policy-based restrictions on FELA claims will become a nullity. Requiring corroborating evidence of an emotional-distress claim addresses these problems and best serves the underlying purpose of FELA: the compensation of employees who suffer actual and serious injuries.

Although this case comes from a trial court's judgment, it is a perfect vehicle for resolving the issue that has vexed the lower courts and that this Court has reserved. It is inconceivable that there will ever be a case where there is less evidence suggesting cognizable emotional injury than here. Under the ruling below, practically every former railroad worker with asbestosis is *ipso facto* entitled to seek emotional-distress damages, even if he disavows any true "fear" of getting cancer. FELA will become a worker-insurance statute without limit, and railroads will be exposed to a "flood of relatively trivial claims [for which] liability may be imposed for highly remote consequences of a negligent act." *Gottshall*, 512 U.S. at 545. This problem is particularly exacerbated in the FELA context, where plaintiffs face fewer substantive and procedural hurdles for recovery. This Court should act now to resolve the conflict of authority, eliminate the injustice of

the unlawful judgments below, and vindicate its policy-based restrictions on emotional-distress claims under FELA.

## II. THIS COURT SHOULD RESOLVE THE SQUARE CONFLICT OF AUTHORITY ON THE CRITICAL QUESTION OF APPORTIONMENT OF DAMAGES UNDER FELA.

The court below instructed the jury that, if it found N&W in the slightest degree liable for respondents' asbestos-related injuries, it should hold N&W liable for 100% of the damages despite uncontroverted evidence of numerous other causes of respondents' injuries. The court justified its instruction based on the language of FELA and the traditional concept of joint and several liability, which is still recognized in only a minority of jurisdictions – including West Virginia. Pet. App. 18a. As railroad employers now face substantial liability for entirely uncorroborated claims, apportionment has become a vital issue of law that remains unanswered in the FELA context. The decision below is in square conflict with the Supreme Court of Pennsylvania, which requires apportionment of damages in FELA asbestos cases, and also conflicts with the reasoning of the Fourth, Seventh, and Tenth Circuits and the Nebraska Supreme Court, all of which have apportioned damages so that a FELA defendant is responsible only for those injuries its negligence caused. Resolution of this question is critical given that Pennsylvania and West Virginia are adjoining states, and the plaintiff's bar has every incentive and ability to shift Pennsylvania asbestos-related claims to the West Virginia courts. See *infra* at 26-29.

The history and language of FELA suggest that damages should be apportioned among those who are responsible for the injuries of an employee. FELA's adoption of a comparative negligence regime was radical at the time. See 45 U.S.C. § 53; see also *Coats* v. *Penrod Drilling Corp.*, 61 F.3d 1113, 1147-48 (5th Cir. 1995) (en banc) (Garwood, J., dissenting). Under FELA, a railroad carrier shall be liable to "any person suffering injury *while he is employed by such carrier*," and

not for injuries suffered outside the scope of employment. 45 U.S.C § 51 (emphasis added). This statutory framework, together with this Court's construction of FELA in accordance with evolving principles of common law, require a departure from the strict principles of joint and several liability and the establishment of some standard of apportionment in FELA actions.

The Supreme Court of Pennsylvania has recognized the necessity of apportionment of damages under FELA. In *Dale* v. *Baltimore & Ohio R.R.*, 552 A.2d 1037 (Pa. 1989), the plaintiff sued his employer for injuries caused in part by his exposure to asbestos in the course of his employment. The Supreme Court of Pennsylvania noted that 45 U.S.C. § 51, in isolation, did not clearly call for apportionment where "the railroad's negligence was not the cause of all of the damages." *Dale*, 552 A.2d at 1041. The court resolved this ambiguity based on its reading of 45 U.S.C. § 53, which specifically mandates apportionment for a plaintiff's contributory negligence:

> If there is a statutory requirement that FELA awards shall be diminished by the amount of an employee's contributory negligence, it is implicit in the statutory scheme that liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused. Thus, we hold that an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

*Id.* This holding is in square conflict with the decision below.

The Seventh Circuit also apportioned damages where a FELA plaintiff was seeking recovery for two injuries – only one of which was caused by his employer's negligence. *Shupe* v. *New York Cent. Sys.*, 339 F.2d 998 (7th Cir. 1965). The Seventh Circuit held that a FELA plaintiff "cannot recover damages which are not proximately caused by defendant's alleged negligence." *Id.* at 1000. In these circumstances, the plaintiff "ha[s] the burden of proving what proportion, if any, of the alleged [damages] was caused by the [defendant's negligence]." *Id.*

Courts have also apportioned damages in FELA actions involving pre-existing conditions. The Fourth Circuit upheld a jury instruction asserting that the plaintiff was not entitled to damages "for any condition existing prior to the alleged injury for which (the railroad) was not in any way responsible in causing or aggravating." *Akers* v. *Norfolk & W. Ry.*, 417 F.2d 632 (4th Cir. 1969) (internal quotation marks omitted). This instruction was a "correct statement of the law" in not holding the defendant responsible for injuries it did not cause. *Id.* The Seventh Circuit also upheld a jury instruction to apportion damages between a pre-existing condition and its aggravation as a result of the employer's negligence. *Varhol* v. *National R.R. Passenger Corp.*, 909 F.2d 1557, 1565 (7th Cir. 1990). The Supreme Court of Nebraska recently upheld a similar instruction prohibiting recovery for pre-existing conditions in a FELA action. *Gustafson* v. *Burlington N. R.R.*, 561 N.W.2d 212, 219-20 (Neb. 1997).

Courts have apportioned damages in FELA actions even where plaintiffs contend that there is insufficient evidence to allocate percentages of responsibility among the multiple causes of injury. The Tenth Circuit upheld a jury's apportionment of damages between a plaintiff's pre-existing condition and the aggravation of that condition as a result of his employer's negligence. *Sauer* v. *Burlington N. R.R.*, 106 F.3d 1490, 1493 (10th Cir. 1996). The court found that expert testimony was not required for apportionment: "The

extent to which an injury is attributable to a preexisting condition or prior accident need not be proved with mathematical precision or great exactitude. The evidence need only be sufficient to permit a rough practical apportionment. Although apportionment may be difficult, like comparative negligence it is a question for which juries are well suited." *Id.* at 1494 (internal citations omitted). Unlike the court below, these courts recognize the principle that railroads under FELA may only be held responsible for that part of the injury attributable to the railroad's negligence.

On the other side of the divide, some courts have refused to apportion damages in FELA actions based on the traditional concept of joint and several liability. Under joint and several liability, a defendant is liable for the entire amount of damages, and must then seek contribution or indemnity from the other tortfeasors. The Fifth Circuit has interpreted FELA to incorporate the traditional rule of joint and several liability. *Coats*, 61 F.3d at 1134. The court reached this conclusion based on a statutory interpretation in direct conflict with the Supreme Court of Pennsylvania: "section 53 of the FELA provides that a plaintiff may recover the total amount of his judgment less that part representing his own contributory negligence. There is no exception in [FELA] for cases in which one or more of the defendants fails to pay its share." *Id.* (internal citation omitted). In dissent, five of the judges believed that apportionment might be permitted in FELA actions, particularly in light of the statutory consideration of comparative fault between the plaintiff and defendant. *Id.* at 1169-70 (Garwood, J., dissenting).

The Eighth Circuit has joined the Fifth Circuit in concluding that joint and several liability prohibits apportionment in FELA actions. *Lockard* v. *Missouri Pac. R.R.*, 894 F.2d 299, 305 (8th Cir. 1990). The Supreme Court of Kansas also has held that a FELA defendant "must bear all of the loss sustained by an employee which is caused jointly by the fault of the carrier and third persons." *Gaulden* v.

*Burlington N., Inc.*, 654 P.2d 383, 391 (Kan. 1982). The employer must then seek contribution or indemnity from other tortfeasors by asserting claims against them in the *same* action. *Id.* Without prior knowledge of this procedural requirement, however, FELA defendants would forfeit their right to apportion liability by failing to join third parties in the course of the lawsuit.

The First Circuit has also refused to apportion damages in FELA actions involving pre-existing conditions. *Stevens* v. *Bangor & Aroostook R.R.*, 97 F.3d 594 (1st Cir. 1996). In *Stevens*, there was expert testimony that a jury could not decipher the cause of the plaintiff's injuries between a pre-existing condition and an accident in the course of employment. *Id.* at 601. The court acknowledged that FELA "does not provide explicit instructions about the appropriate apportionment of damages when the causes of plaintiff's disability are inseparable." *Id.* at 602. The court decided not to apportion damages, and therefore held the defendant liable for all injuries, in consideration of FELA's primary purpose "to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Id.*

There is thus a square and mature conflict among federal courts of appeals and state supreme courts that this Court should resolve. Resolution of this conflict is all the more imperative because the strict rule of joint and several liability followed by the court below is anachronistic. In the absence of express statutory provisions, the Court's duty in interpreting FELA "is to develop a federal common law of negligence . . . informed by reference to the *evolving* common law." *Gottshall*, 512 U.S. at 558 (Souter, J., concurring) (emphasis added). "Instead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law." *Kernan* v. *American Dredging Co.*, 355 U.S.

426, 432 (1958). In recent years, the clear evolution of the common law has been away from joint and several liability (and even for indivisible injuries) in recognition of the fact that defendants should be held responsible only for the damages caused by their own negligence. Joint and several liability is also viewed as an unfair allocation of all risk of uncollectible judgments upon named defendants. FELA defendants are particularly vulnerable in these respects, since they are often the only named defendant and face liability for "even the slightest" causation of an employee's injury. *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957).

Indeed, only 14 states – including West Virginia – have retained the pure form of joint and several liability. See *Restatement (Third) of Torts: Apportionment of Liability* § 17, reporter's note at 151 (2000). Sixteen states have adopted pure several liability, which holds each defendant responsible only for its proportional share of the plaintiff's injuries. *Id.* at 154. For example, Colorado law now provides that "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury." Colo. Rev. Stat. Ann. § 13-21-111.5(1) (West 2000). Twenty states have taken intermediate positions between several and joint and several liability, but even many of these provisions hold defendants severally liable under most circumstances. See, *e.g.*, Cal. Civ. Code § 1431.2 (several liability except for economic damages in certain actions); Conn. Gen. Stat. § 52-572h (several liability, except that plaintiff unable to collect for one year may seek reapportionment of uncollectible share); N.Y. C.P.L.R. 1601 (several liability if defendant 50% or less at fault).

State courts hearing FELA actions are required to apply federal law, which in turn should be determined by evolving standards of common law. See *Dice*, 342 U.S. at 361 ("State laws are not controlling in determining what the incidents of [a FELA] federal right shall be."); *Chapman* v. *Union Pac.*

*R.R.*, 467 N.W.2d 388, 393 (Neb. 1991) (FELA "supersedes a state's common and statutory law"). In clear defiance of this directive, the court below applied the minority position still followed in West Virginia in finding N&W jointly and severally liable for highly prejudicial claims based on scant, uncorroborated evidence. As a result of this clear error, N&W is now solely responsible for massive damage awards to former employees, some of whom had been exposed to asbestos for far longer periods of time after their short-term employment with N&W over 50 years ago.

FELA represents a legislative deviation from certain common-law principles for the benefit of injured employees. These statutory mandates, however, do not justify further departures from other prevailing common-law standards in order to hold employers liable for injuries caused by other tortfeasors outside the period of railroad employment. Unfortunately, the courts of West Virginia have joined other courts in taking exactly such steps with drastic consequences for railroad employers. At the same time, other courts have turned to prevailing common-law principles to "consider the general impact, on workers as well as employers, of the general liability rules they would thereby create." *Buckley*, 521 U.S. at 438. This Court should resolve this conflict and ensure the sensible administration of FELA for the interests of all participants in the railroad industry.

## III. THE COURT SHOULD GRANT REVIEW BECAUSE THE TWO MAJOR EASTERN RAILROADS NOW FACE THOUSANDS OF EMOTIONAL-DISTRESS CLAIMS FILED IN WEST VIRGINIA FOR THE VERY PURPOSE OF EXPLOITING ANTI-RAILROAD RULINGS OF THIS KIND.

The two conflicts of authority discussed above amply justify certiorari in this case. But, in addition, this Court must take into account the realities of current litigation, and the strong likelihood that the ruling below (if unchecked) will

control the asbestos-related liability of the two major Eastern railroads, Norfolk Southern and CSX, both of whom operate in West Virginia. The reason is that West Virginia already is, and will continue to be, the venue in which virtually all such claims are brought.

The dominant reality is that the plaintiff's bar is now highly coordinated, and actively solicits plaintiffs for suits in favorable jurisdictions as part of a plan of "assembly-line litigation" to mass-produce tort claims for "lottery-size verdicts" against corporations. Mike France, *The Litigation Machine*, Bus. Wk., Jan. 29, 2001, at 116, 120, 122-23. The railroad plaintiff's bar has employed these tactics in asbestos-related FELA actions, and has targeted notoriously pro-plaintiff, populist jurisdictions where large judgments are routinely entered against railroads by juries and upheld by trial judges. Indeed, the popularity of West Virginia courts with the plaintiff's bar is evident from a recent administrative order of the West Virginia Supreme Court of Appeals (a copy of which is lodged with the Court by petitioner). That order declares that there are over 25,000 asbestos-related actions (including 2,500 asbestos-related actions against railroads) currently pending in West Virginia (many involving out-of-state plaintiffs, as discussed below). Administrative Order Re: Motion To Refer Asbestos Litigation To The Mass Litigation Panel ¶¶ 2, 11 (W. Va. Dec. 28, 2000) (Petitioner's Lodging Tab A). Moreover, railroads have no right of appellate review of these actions in the two-tiered West Virginia court system, and the elected West Virginia Supreme Court of Appeals (as was true here) frequently declines review. See Pet. App. 1a-2a.

As a result, the plaintiff's bar is increasingly ushering former railroad employees from other states into the courts of West Virginia to take full advantage of rulings of this kind. Indeed, as indicated by copies of FELA complaints lodged with the Court by petitioner, literally *thousands* of out-of-state plaintiffs have filed FELA claims in West Virginia in

recent years. A large portion of these FELA claims involve allegations of asbestos exposure and emotional distress therefrom. As just a few examples, Norfolk Southern is currently the defendant in a FELA asbestos-related action brought by 627 plaintiffs, only 30 of whom are West Virginia residents. Petitioner's Lodging Tab B. CSX is the defendant in a FELA asbestos-related action brought by 190 West Virginia residents and (astonishingly) 1,822 out-of-state plaintiffs. *Id.* at Tab C. The railroad plaintiff's bar is also aggregating thousands of FELA claims on behalf of out-of-state plaintiffs seeking recovery for other types of injuries. For example, CSX and Norfolk Southern (as successors to Conrail) were defendants in two FELA actions brought by 1,883 plaintiffs, only 124 of whom are West Virginia residents, for alleged repetitive-motion injuries. *Id.* at Tabs D & E. The *in terrorem* effect of such large mass tort actions creates undue pressure on defendants to settle even meritless claims. Cf. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.).

The railroads are particularly vulnerable to these tactics, because FELA actions may be brought in any district "of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56. Moreover, railroads may not remove these actions to federal court. See 28 U.S.C. § 1445(a).

Thus, the decision in this case for all practical respects will govern the asbestos-related liability of Norfolk Southern and CSX in future litigation involving thousands of employees. The West Virginia Supreme Court of Appeals has made clear that it will not grant a petition for appeal in these types of cases. On the important and pressing issues in this case which recur in thousands of other cases, this Court should intervene to clarify the limits on railroad liability for emotional-distress damages and to ensure that compensation for these claims is fair and just.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 24, 2001

# APPENDICES

# APPENDIX A

## STATE OF WEST VIRGINIA

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No. 002774

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At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of January, 2001, the following order was made and entered:

HOMER DYE, LEO THACKER, JETHRO DARL WALKER, MELLINGTON A. WHEELER AND JACK A. LAMBERT,
*Plaintiffs Below, Respondents,*

vs.

NORFOLK & WESTERN RAILWAY COMPANY, *et al.*,
*Defendants Below,*

NORFOLK & WESTERN RAILWAY COMPANY,
*Defendant Below, Petitioner.*

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On a former day, to-wit, December 7, 2000, came the petitioner, the Norfolk & Western Railway Company, by Huddleston, Bolen, Beatty, Porter & Copen, Luke A. Lafferre and Rodney L. Baker, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Mingo County, rendered on the 23rd day of September, 1999, with the record accompanying the petition. Previously, on the 22nd day of November, 2000, came the respondents, Homer Dye, Leo Thacker, Jethro Darl Walker, Mellington A. Wheeler and Jack A. Lambert, by James A. McKowen, their attorney, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: /s/ [Illegible]
Clerk, Supreme Court of Appeals

## APPENDIX B

IN THE CIRCUIT COURT OF MINGO COUNTY,
WEST VIRGINIA

[Filed Sep. 23, 1999]

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HOMER DYE
Civil Action No. 96-C-235

LEO THACKER
Civil Action No. 96-C-239

JETHRO DARL WALKER
Civil Action No. 96-C-240

MELLINGTON A. WHEELER
Civil Action No. 96-C-241

JACK A. LAMBERT
Civil Action No. 97-C-098

*Plaintiffs*,

v.

NORFOLK & WESTERN RAILWAY COMPANY, et al.,

*Defendants*.

---

FINAL ORDER

This decision pertains to the Defendants' Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial and Remittitur. A hearing was conducted and oral arguments presented pertaining to said motion. This Court has reviewed all pertinent legal documents of record, the applicable legal authorities, and has considered the oral arguments presented by the parties. Based upon the foregoing deliberations, and for the purposes of this decision, the Court makes the following Findings of Fact, Conclusions of Law and Decision, to wit:

## Findings of Fact

1. A jury trial was conducted on FELA claims asserted by the five (5) Plaintiffs against Norfolk & Western Railway Company. The jury returned verdicts in favor of all five plaintiffs and, on March 8, 1999, the Court entered Judgment Orders for the plaintiffs after deducting offsets for settlements with various manufacturers of asbestos products.

2. During trial, all Plaintiffs testified that they were exposed to asbestos and other toxic airborne contaminants; that their employer failed to warn about the hazards of exposure to said contaminants; that their employer failed to provide protection against the contaminants and about their medical conditions and fears or concerns about developing cancer. A co-worker, Doyle Johnson, also testified about the exposure to the airborne contaminants.

3. Dr. Garritt Schepers testified by videotaped deposition about the scientific, medical and industrial knowledge of asbestos-related medical problems. He also testified about the defendant's representatives attending annual meetings conducted by the Association of American Railroads where hazards of occupational exposure to dust were discussed as early as 1932. He also testified that wide acceptance of the potential for asbestos to cause cancer of the pleural lining existed by at least 1960.

4. Dr. Dominic Gaziano testified that each of the Plaintiffs suffered from pulmonary fibrosis consistent with pneumoconiosis, that the plaintiffs' breathing problems were related to their pulmonary fibrosis and that their pulmonary fibrosis had been caused by their occupational exposure to asbestos and other toxic dusts. He also testified that the Plaintiffs were at greater risk

of developing cancer due to their occupational exposure to toxic dusts.

5. Arnold Brody, a prominent scientist, testified about his research concerning effects of asbestos fibers on the lung and opined that persons inhaling asbestos are at greater risk of contracting cancer.

6. The Plaintiffs introduced documents demonstrating that the defendant knew or should have known the dangers of asbestos and other airborne dusts as early as the 1930s.

7. The Plaintiffs also introduced documents showing, inter alia, that the plaintiffs should have been educated about the risks associated with exposure to airborne dusts; that the defendant should have explored less toxic alternative; that the levels of toxic dust should have been decreased by a variety of means; that respiratory protective equipment should have been provided; that testing on levels of toxic dust should have been performed and that the plaintiffs should have been tested and monitored.

## Conclusions of Law

### A.

### Standards for Granting Motion for Judgment as a Matter of Law, for a New Trial and for a Remittitur

1. In deciding whether to grant a motion for judgment as a matter of law, all evidence must be considered in the light most favorable to the plaintiffs; all conflicts in the evidence are assumed to have been resolved by the jury in the plaintiffs' favor, all facts which plaintiffs' evidence tended to prove are deemed proven, and plaintiffs are entitled to the benefit of all favorable inferences which reasonable [sic] may be drawn from the facts proven. Syllabus Pt. 1, *Finley v. Norfolk &*

*Western Railway Co.*, 1999 WL 503837 (W.Va. July 15, 1999) (per curiam).

2. A motion for a judgment notwithstanding the verdict (now called a motion for judgment as a matter of law) is governed by a different standard than a motion for a new trial. This Court ". . . [m]ay only enter judgment notwithstanding the verdict when 'the facts and inferences point so strongly and overwhelmingly in favor of the movant that no reasonably [sic] jury could have reached a vedict against the movant' ". *Gonzalez v. Conley*, 199 W.Va. 288, 291, 484 S.E.2d 171, 174 (1997) *citing Alkire v. First National Bank of Parsons*, 197 W.Va. 122, 128, 475 S.E.2d 122, 128 (1996).

3. Whereas a motion for a new trial may be granted: "If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice . . .". *Gonzalez v. Conley*, 199 W.Va. 288, 291, 484 S.E.2d 171, 174 (1997).

4. The legal rule concerning the discretion of the trial court to set aside a jury verdict and grant a motion for remittitur is set forth in *Addair v. Majestic Petroleum Co., Inc.*, 160 W.Va. 105, 232 S.E.2d 821 (1997) as follows:

> Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption.

5. Pertinent considerations in ascertaining whether a jury award is excessive include evidence of medical bills and records, frequency of hospital or doctor visits,

evidence of permanent injury, lost wages, and the physical and emotional appearance of plaintiff at trial. *Adkins v. Foster*, 187 W.Va. 730, 421 S.E.2d 271 (1992).

B.

Errors Asserted by the Defendant in Support Of Defendant's Motions for Judgment as a Matter Of Law, or for a New Trial or for a Remittitur

The Defendant has asserted numerous grounds and errors in support of it's Motions for Judgment as a Matter of Law, for a New Trial or for a Remittitur. In order to ensure that each of the Defendant's grounds or assertions are addressed, this Court will treat each separately in this Order.

a). Is the Defendant entitled to judgment as a matter of law because the facts and inferences at trial point so strongly and overwhelmingly in favor of the Defendants that no reasonable jury could have reached a verdict for the Plaintiffs?

1. Considering all evidence in a light most favorable to Plaintiffs, assuming all conflicts in evidence were resolved by the jury in Plaintiffs' favor, deeming all facts which the Plaintiffs' evidence tended to prove as proven, and conferring upon the Plaintiffs the benefit of all favorable inferences which may have been reasonably drawn from the facts proven, this Court is of the opinion that a reasonable jury could clearly have reached a verdict for the Plaintiffs.

2. The Plaintiffs introduced evidence pertaining to the Plaintiffs exposure to asbestos and other toxic airborne contaminants and concerning the industrial knowledge of occupational exposure to these contaminant [sic]; evidence of the damage to plaintiffs as a result of the exposure and concerning research demonstrating the

greater risk of cancer from such an exposure; evidence of the various methods that should have been used by the Defendants to address the danger of exposure and the Defendants failure to protect the Plaintiffs from the danger, and evidence of the Plaintiffs' fears concerning their condition and the development of cancer.

3. The evidence introduced by the Defendants may have been in conflict with evidence introduced by the Plaintiffs, but it certainly did not rise to being so strongly and overwhelmingly in their favor that a reasonable jury could not have rendered a verdict in favor of the Plaintiffs.

4. Therefore, based upon the foregoing, this Court is of the opinion that the Defendant's assertions fail to rise to the standard necessary for the Court to grant Defendant's Motion for Judgment as a Matter of Law, and the same is hereby DENIED.

b). Is the Defendant Entitled to a New Trial Due to the Plaintiffs' Failure to Prove Liability Under the FELA?

1. This Court has undertaken weighing the evidence introduced at trial and has considered the credibility of the witnesses. The Court finds that the verdict was consistent with the clear weight of the evidence and that the verdict was *not* based upon false evidence nor will the verdict result in a miscarriage of justice.

2. The Defendant asserts that it is entitled to a new trial because the Plaintiffs offered no evidence other than their own testimony concerning exposure to various kinds of airborne contaminants. The Court notes that a co-worker of Homer Dye, Doyle Johnson, also testified about the exposure, and that the Defendant failed to introduce sufficient evidence to controvert the Plaintiffs' testimony about their exposure. There was sufficient evidence that the Plaintiffs were exposed to airborne contaminants. Therefore, this particular

assertion by the Defendant is an insufficient basis for the Court to grant a new trial.

3. The Defendant asserts that the Plaintiffs failed to introduce sufficient evidence to prove their claim, which includes a duty, breach of duty, foreseeability and causation. The Court finds that the Plaintiffs introduced evidence on each of these elements. With respect to duty, the Plaintiffs introduced evidence pertaining to the knowledge in the industry, including the railroad industry, about toxic airborne contaminants. With respect to breach of duty, the Plaintiffs introduced evidence pertaining to the Defendant's failure to exercise reasonable care to provide the Plaintiffs a safe place to work. The Plaintiffs also introduced sufficient evidence concerning the element of foreseeability, including industrial knowledge of the dangers associated with exposure to airborne contaminants, literature published in the medical, scientific and industrial communities; and meetings pertaining to hazards of occupational dust conducted by the Association of American Railroads and attended by representatives of the Defendant. Evidence pertaining to causation included testimony by multiple experts including the medical condition of the Plaintiffs, medical publications concerning the risks of exposure to airborne contaminants and research on effects of exposure to airborne contaminants. Based upon the foregoing, this Court is of the opinion that the jury's verdict was supported by evidence pertaining to duty, breach of duty, foreseeability and causation. Therefore, this court finds this asserted basis for a new trial is without merit.

4. Therefore, based upon the foregoing, the Court finds that the Defendant's Motion for a New Trial based upon the grounds asserted herein are without merit and the Defendant's Motion is DENIED.

c). Is the Defendant Entitled to a New Trial Due to the Court's Error in Submitting the Plaintiffs' "Fear of Cancer" Claim and in Receiving Evidence of the Same?

1. The Defendant asserts that the Court erred in submitting the Plaintiffs' "fear of cancer" claims and in receiving evidence of the same relying primarily upon *Metro-North Commuter Railroad v. Buckley*, 521 U.S. 424 (1997). That case is factually distinguishable from the case at hand in that this case involved plaintiffs who had manifested symptoms of a disease consistent with their exposure to toxic airborne contaminants. Whereas the *Metro-North* case involved plaintiffs who had no physical manifestation of their exposure to airborne contaminants and were bringing suit for the emotional distress associated with their fear of possible physical manifestation, more particularly, cancer.

2. The *Metro-North* case discussed the preclusion of recovery of emotional distress damages where symptoms of a disease had not manifested. However, that decision does *not* preclude recovery for negligently caused emotional distress relating to the manifestation of disease as a result of physical contact with a toxic airborne contaminant.

3. The Plaintiffs introduced evidence substantiating the manifestation of disease as a result of exposure to toxic airborne contaminants. They also submitted evidence pertaining to the increased risks of developing cancer, and they testified concerning their distress at learning of their disease and the increased risk of developing cancer.

4. Further, the issue of whether or not a Plaintiff who suffers emotional distress without a present physical injury can bring an independent action to recover future costs associated with diagnosis of afflictions precipitated by the fear of contracting an affliction was

recently addressed by our Supreme Court of Appeals of West Virginia in *Bower, et al. v. Westinghouse Elec. Corp.*, No 25338 (July 19, 1999). The Supreme Court specifically *rejected* the contention that a claim for future medical expenses must rest upon the existence of present physical manifestation of a disease.

5. Based upon the foregoing, particularly in light of the recent Supreme Court decision in *Bower*, the Defendant's argument that it should be granted a new trial due to the submission of Plaintiffs' emotional distress and fear of cancer claim and the admission of Plaintiffs' evidence pertaining to the same is without merit.

6. With respect to the Defendant's argument that the Court erred in sustaining the Plaintiff's objections to the Defendant's questioning Plaintiffs about their first discussion of "fear of cancer" with their counsel based upon attorney-client privilege, the Court finds this argument, without legal support and without merit.

7. With respect to Defendant's argument that the Court erred in admitting cancer evidence (used to demonstrate that the Defendant should have provided medical surveillance) because the prejudicial effect of the evidence outweighed its probative value, this Court conducted a balancing of the respective parties' interests and found that the probative value of this evidence to the Plaintiffs' claims were greater than any potential prejudice to the Defendant. This asserted basis for a new trial is without merit.

8. Therefore, based upon the foregoing, the Court finds that the Defendant's Motion for a New Trial based upon the grounds asserted herein is without merit and the Defendant's Motion is DENIED.

d). Is the Defendant Entitled to a New Trial Based Upon the Court's Errors in Receiving Certain Evidence and Refusing Other Evidence?

1. The Defendant asserts that the Court erred in permitting the Plaintiffs to introduce evidence pertaining to the "Ancel Wheeler" claim against the Defendant and in refusing to allow the Defendant to introduce the Ancel Wheeler Death Certificate or to permit Dr. Francis Weir or Dr. Joseph Renn to discuss the death certificate.

2. The Plaintiffs introduced the "Ancel Wheeler" claim to demonstrate that the Defendants had notice of a claim pertaining to an employee's development of asbestosis as a result of working for the Defendant railroad. The Court found that the probative value of the evidence outweighed any prejudicial effect to the Defendant. Whatever prejudice may have resulted to Defendant was harmless and the Court finds this basis for a new trial without merit.

3. With respect to the Court's decision to exclude the Ancel Wheeler death certificate, the Defendant sought to use the certificate to rebut that the Defendant was put on notice by the Ancel Wheeler claim. The Defendant's [sic] offered no evidence to prove that the cause of death listed was based upon any examination or autopsy. Further, the Court found that the certificate was being used to show that Ancel Wheeler died years after making his claim against the Defendant railroad which fails to be evidence rebutting notice to the Defendant of claims concerning asbestosis as a result of working for the Defendant. The Defendant failed to show that the evidence was actually being offered in a manner consistent with the Defendant's own representations that it was being offered for rebuttal. Therefore, the Court refused to receive that evidence. Whatever prejudice may have resulted to the Defendant

due to the Court's refusal to allow the Ancel Wheeler Death Certificate was harmless. Therefore, this is an insufficient basis on which this Court could grant a new trial.

4. The Defendant's assertion of Court error in refusing to permit Dr. Francis Weir or Dr. Joseph Renn to discuss the Ancel Wheeler death certificate is without merit based upon the foregoing discussion of the Court's refusal to admit the death certificate.

5. The Defendant asserts that the Court erred in refusing to receive evidence and testimony from N&W Industrial Hygienist David Tucker. However, Defendant failed to proffer an argument which demonstrated to the Court that the evidence was being used for the reason asserted by the Defendant. Therefore, the Court refused to receive said evidence and testimony. The Defendant still fails to advance sufficient argument to show that the evidence was to be used for the reasons advanced by the Defendant. Therefore, this basis for a new trial is without merit.

6. The Defendant asserts that the Court erred in refusing to admit the Plaintiffs' Monongalia County Complaints against asbestos manufacturers. These Complaints included a conspiracy claim wherein the Plaintiffs asserted that the manufacturers conspired to conceal the dangers of asbestos from the public, consumers, users, government and industry. The Defendant wanted to have this evidence admitted to show that the allegations in that suit were inconsistent with the Plaintiffs' allegations against the Defendant in the case at hand. Although the Court found that this evidence was admissible, the Court determined that the danger of confusing the jury with respect to distinguishing the claims asserted in the Monongalia case and those asserted in the case at hand would result in unfair

prejudice to the Plaintiffs that outweighed the probative value of the evidence. The Defendant asserts no additional argument to convince this Court of any impropriety with respect to the Court's ruling. Therefore, this asserted basis for a new trial is without merit.

7. The Defendant asserts that the Court erred in refusing the admission of the Elkhorn Tunnel Studies. The Defendant failed to timely identify and produce this exhibit in accordance with the Court's Scheduling Order. Therefore, this basis for a new trial is without merit.

8. The Defendant asserts that the Court erred in failing to admit a locomotive air sampling study by Dr. Weir. However, the Defendant failed to timely identify and produce this exhibit in accordance with the Court's Scheduling Order. Therefore, this basis for a new trial is without merit.

9. The Defendant asserts that the Court erred in receiving evidence of the Jack Ward Deposition transcript. However, the Defendant fails to detail any prejudice or harm to the Defendant as a result of that particular ruling. Therefore, this asserted basis for a new trial is without merit.

10. The Defendant asserts that the Court erred in receiving the Plaintiffs' medical records, which the Defendant had stipulated were genuine and authentic. The information in those records were admissible pursuant to Rule 803(4) and 803(6) of the West Virginia Rules of Evidence which excludes that such evidence from treatment as hearsay. The Defendant fails to advance convincing argument that those medical records were unduly prejudicial or confusing. Therefore, this asserted basis for a new trial is without merit.

11. The Defendant asserts that the Court erred in admitting evidence of the propensity of asbestos dust to cause cancer. This is essentially the same argument that Defendant advanced concerning the Plaintiffs' "fear of cancer" claim. For purposes of addressing this error, the Court incorporates herein the analysis hereinabove under "c). Is the Defendant Entitled to a New Trial Due to the Court's Error in Submitting the Plaintiffs' "Fear of Cancer" Claim and in Receiving Evidence of the Same?" The Court finds that this asserted basis for a new trial is without merit.
12. The Defendant asserts that the Court erred in receiving Plaintiffs' Exhibit No. 7, affidavit of F. Miller, authenticating a "vial of dust". The Defendant fails to assert a legal argument in support of this allegation of error. Therefore, the Court is precluded from adequately reviewing the same and finds that this basis for a new trial is without merit.
13. The Defendant asserts that the Court erred in admitting Plaintiffs' Exhibit Nos. 2, 8, 9, 10 and 17 pertaining to sandblasting. The Court found that they were relevant and that they were not unduly prejudicial for the purpose that they were being admitted. The Defendant fails to assert a legal argument in support of this allegation of error. Therefore, the Court is precluded from adequately reviewing the same and finds that this basis for a new trial is without merit.
14. The Defendant asserts that the Court erred in admitting Plaintiffs' Exhibit Nos. 12, 13, 14 and 15, which were specifications for products containing asbestos used by the railroad. These exhibits were admitted as genuine, authentic, and relevant, and not unduly prejudicial. The Defendant fails to assert a legal argument in support of this allegation of error. Therefore, the Court is precluded from adequately reviewing the same and finds that this basis for a new trial is without merit.

15. The Defendant asserts that the Court erred in admitting the "Ancel Wheeler Complaint". This essentially [sic] the same argument as asserted hereinabove. For purposes of addressing this asserted error, the Court incorporates fully herein Paragraphs 1 and 2 pertaining to the analysis of the admission of the "Ancel Wheeler Complaint". Based upon the foregoing analysis, the Court finds that this asserted basis for a new trial is without merit.

16. The Defendant asserts that the Court erred in admitting Plaintiffs' Exhibit Nos. 18, 19, 22 and 26. The Defendant fails to advance any legal argument in support of the Defendant's assertion of Court error. Therefore, the Court is precluded from adequately addressing the same and finds that this asserted basis for a new trial is without merit.

17. The Defendant asserts that the Court erred in admitting Plaintiffs' Exhibit Nos. 6, 7, 8, and 9 which were medical records of the Plaintiffs. This assertion was addressed hereinabove under Paragraph 10, and, for purposes of addressing this assertion, the Court fully incorporates herein the analysis contained in Paragraph 10. Based upon the foregoing, the Court finds that this asserted basis for a new trial is without merit.

18. The Defendant asserts that the Court erred in refusing Defendant's Exhibit Nos. 3 (Plaintiffs' Monongalia County Asbestos Complaint), No. 5 (Dr. Weir's locomotive air sampling study), No. 8 (Ancel Wheeler death certificate) and No. 10 (Plaintiffs' medical records). All of these assertions are duplicative and have been addressed hereinabove. Therefore, the Court finds that these asserted bases for a new trial are without merit.

19. The Defendant asserts that the Court erred in failing to sustain objections to improper argument by the

Plaintiffs' counsel. The Defendant fails to identify the alleged improper argument or advance a legal argument in support of this asserted error. Therefore, the Court is precluded from adequately addressing the same and finds this asserted basis for a new trial without merit.

20. The Defendant asserts that the Court erred in receiving testimony from witness Doyle Johnson concerning his previous asbestos case against the Defendant. However, the Defendant's counsel opened the door to the testimony of which Defendant complains during cross-examination of this witness. This Court finds that this asserted basis is without merit.

21. Based upon the foregoing, the Court finds that Defendant's Motion for a New Trial pursuant to the grounds asserted herein is without merit and said Motion is hereby DENIED.

e). Is the Defendant Entitled to a New Trial Based Upon the Court's Errors in Giving Certain Instructions and Refusing Other Instructions?

1. The Defendant asserts that the Court erred in giving its instruction on causation, which included the phrase "however slight" to describe the necessary causal relationship between the defendant's wrongful conduct and the plaintiffs' injuries. The Court finds that the language "however slight" was the proper standard of causation to be applied to the jury. *Gardner v. CSX Transp., Inc.*, 201 W.Va. 490, 498 S.E.2d 473 (1997) (". . . [t]he standard of causation under FELA imposes liability on a railroad if it or its agent's negligence played any part, even the slightest, in producing the employee's injury . . ."). The Court recognizes that FELA still requires that actionable negligence must be established against the employer in order to create liability. However, there is no question that an

actionable negligence claim was supported by the Plaintiffs' evidence in this case. Therefore, the Court finds that this asserted basis for a new trial is without merit.

2. The Defendant asserts that the Court erred in instructing the jury that the Defendant was liable for all Plaintiffs' damages if its negligent conduct caused any portion of those damages. However, the Court's instruction was compelled by the language of FELA, the indivisible nature of the Plaintiffs' injuries, and the established doctrine of joint and several liability. *See*, 45 U.S.C.A. 51 (every common carrier by railroad while engaging in interstate commerce "shall be liable in damages to any person suffering injury while . . . employed by such carrier in such commerce," if the injury resulted "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . ."): *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1049-96 [sic] (5th Cir. 1973)(asbestosis is an indivisible injury): *Rice v. Cincinnati, New Orleans & Pacific Railway Co.*, 920 F.Supp. 732 (E.D.Ky. 1996)(if railroad's negligence is causally related to a plaintiff's injuries, the plaintiff can recover all of his damages from the railroad in multiple tortfeasor situations under the doctrine of joint and several liability). Therefore, the Court finds that this asserted basis for a new trial is without merit.

3. The Defendant asserts that the Court erred in refusing the Defendant's Instruction No. 2, entitled "Railroad Not an Insurer". The Court's instructions included a full charge to the jury that the Plaintiffs had the burden to prove negligence and causation. The Defendant's proposed instruction was unnecessary and redundant given the fact that the principles pertaining to negligence and causation were already covered. *See, Roberts v. Stevens Clinic Hospital, Inc.*, 176 W.Va. 492,

345 S.E.2d 791 (1986). Therefore, the Court finds that this asserted basis for a new trial is without merit.

4. The Defendant asserts that the Court erred in refusing Defendant's Instruction Nos. 5, 6 and 7 pertaining to assumption of the risk of cigarette smoking, and aggravation and smoking, respectively. However, the Plaintiffs' diseases for which they sought compensation, silicosis or asbestosis, is not caused by cigarette smoking. Moreover, assumption of risk is not an available defense in FELA cases. *See Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943); 45 U.S.C. 54. Therefore, this asserted basis for a new trial is without merit.

5. The Defendant asserts that the Court erred in refusing Defendant's Instruction No. 8, which pertains to statute of limitations. However, the Court fully considered and analyzed this issue and ruled that there was no evidence that the Plaintiffs knew or should have known that they had asbestos prior to the three year period before the claims in this case were filed. The Defendant argued that the Plaintiff testified about having respiratory problems more than three years prior to the filing of this action. However, the Defendant's [sic] offered no evidence that the Plaintiffs' [sic] knew or should have known that they had asbestosis. The Defendant fails to proffer any further evidence of notice to Plaintiffs of their condition. Therefore, this asserted basis for a new trial is without merit.

6. The Defendant asserts that the Court erred in refusing to instruct the jury on contributory negligence relating to smoking. Again, the Plaintiffs' occupational diseases could not be caused by cigarette smoking. The Court finds that the refusal of this particular instruction was proper and that this asserted basis for a new trial is without merit.

7. The Defendant asserts that the Court erred in refusing Defendant's Instruction No. 13, which pertained to mitigation of damages as it relates to cigarette smoking. For the reasons set forth hereinabove, the Court finds that this asserted basis is without merit.

8. The Defendant asserts that the Court erred in refusing Defendant's Instruction Nos. 14 and 15, which pertained future damages and calculation of present worth. However, the Court properly excluded those instructions since intangible damages of physical injury, pain and suffering and emotional distress are not to be reduced to present value, and an instruction to the contrary may have constituted reversible error. *O'Byrne v. St. Louis Southwestern Ry. Co.*, 632 F.2d 1285 (5th Cir., Unit A 1980)(per curiam); *Iler v. CSX Transportation, Inc.*, 209 Ga.App. 653, 434 S.E.2d 499 (1993). Therefore, the Court finds that this asserted basis for a new trial is without merit.

9. The Defendant asserts that the Court erred in refusing Defendant's Instruction No. 17 pertaining to the prohibition of punitive damages in FELA actions. However, the Court carefully instructed the jury on exactly what damages could be awarded. Nothing in the instructions or verdict forms suggested that the jury could award punitive damages. Therefore, the Court finds that this asserted basis for a new trial is without merit.

10. The Defendant asserts that the Court erred in failing to give Defendant's Instruction No. 18, which improperly stated the law on "fear of cancer". This Court has fully reviewed and analyzed the "fear of cancer" issue hereinabove under "c. Is the Defendant Entitled to a New Trial Due to the Court's Error in Submitting the Plaintiffs' 'Fear of Cancer' Claim. . .". The Court fully incorporates herein the analysis therein and, based upon

the same, finds that this asserted basis for a new trial is without merit.

11. The Defendant asserts that the Court erred in failing to give Defendant's Supplemental Instruction No. 1 pertaining to the Plaintiffs' right to file an additional claim if the Plaintiffs' developed cancer. The Defendant fails to provide any legal basis for this assertion, precluding the Court from reviewing the same. Therefore, the Court finds that this asserted basis for a new trial is without merit.

12. Based upon the foregoing, the Court hereby finds that the Defendant's Motion for a New Trial based upon Court error in giving certain instruction and refusing other instruction is without merit, and the Court finds that Defendant's Motion is hereby DENIED.

f.) Is the Defendant Entitled to a New Trial By Virtue of an Excessive Verdict?

1. The Defendant asserts that the jury's verdict is against the weight of the evidence. However, the Court finds that there existed ample evidence of damages suffered by each of the Plaintiffs in this matter to support the jury's award. The Court is not persuaded by Defendant's argument that the jury's award was punitive in nature. Further, as more fully discussed hereinbelow concerning the Defendant's assertion of entitlement to a remittitur, the Court finds that the verdict was not excessive. Therefore, the Court finds that this asserted basis for a new trial is without merit and the Defendant's Motion for a New Trial based upon the same is hereby DENIED.

g). Is the Defendant Entitled to a New Trial on the Assertion That the Jury's Award Was Made on a Per Diem Basis?

1. The Defendant asserts that the Jury based its awards to each Plaintiff on a per diem basis. However, the Defendant's assertion is mere conjecture.

2. The general rule is that verdicts may not : ". . . [b]e impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict." Syllabus Point 2, *McDaniel v. Kleiss*, 198 W.Va. 282, 480 S.E.2d 170 (1996). Further, juror confusion over law or evidence may not be used to impeach a verdict. *State v. Scotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981).

3. The verdict in this case is reasonable based upon the evidence presented at trial and will not be disturbed based upon conjecture.

4. Therefore, based upon the foregoing, the Court finds that this asserted bases for a new trial is without merit.

h). Is the Defendant Entitled to a Remittitur Due to an Excessive Jury Verdict?

1. The respective awards to each of the Plaintiffs in this matter do not appear "monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption". *Addair v. Majestic Petroleum Co., Inc.*, 160 W.Va. 105, 232 S.E.2d 821 (1997). Evidence pertaining to the Plaintiffs [sic] medical conditions, permanent injury, physical and emotional impairment, and pain and suffering was offered at trial supporting the jury's verdict. Therefore, the Court finds that the Defendant's Motion for Remittitur should be and the same is hereby DENIED.

## Decision

WHEREFORE, based on the foregoing, this Court hereby ORDERS, ADJUDGES and DECREES that the Defendant's Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial and Remittitur is hereby DENIED. The Clerk shall provide copies of this Order to all counsel of record.

ENTERED this 23rd day of September, 1999.

/s/ Michael Thornsbury
The Honorable Michael Thornsbury

A COPY TESTE

/s/ Grant Preece
Circuit Clerk, Mingo County, W.Va.

# APPENDIX C

## 45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

**45 U.S.C. § 53. Contributory negligence; diminution of damages**

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

**45 U.S.C. § 56. Actions; limitations; concurrent jurisdiction of courts**

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.)

## APPENDIX D

IN THE CIRCUIT COURT OF
MINGO COUNTY, WEST VIRGINIA

---

*In Re:*

Civil Action No. 96-C-235
HOMER DYE

Civil Action No. 96-C-241
MELLINGTON A. WHEELER

Civil Action No. 97-C-098
JACK A. LAMBERT

Civil Action No. 96-C-239
LEO THACKER

Civil Action No. 96-C-240
JETHRO DARYL WALKER

*Plaintiffs,*

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation,

*Defendant.*

---

## JURY INSTRUCTIONS

### INTRODUCTION

First, counsel, the parties and I want to thank you for your patience and attention throughout this case, your care in the consideration of the evidence and patience during recesses and delays.

These instructions are given to you to explain the law as it relates to: 1) the rules which you must follow in your deliberations and in weighing and considering the evidence, and (2) the law governing the claims of the plaintiffs and the defense of the defendant.

As you may know, my role and yours are quit different . It is my duty as a Judge essentially to act as a referee during the trial and to instruct you about the law which applies to this case. It is your duty to decide the facts and, in deciding these facts, to comply with the rules of law and apply the rules of law as I state them to you. If you disagree with the law that I explain to you, you must nevertheless apply that law because you have taken an oath to respect the law of this State.

In your review of the evidence and in reaching a decision, you should not be influenced by sympathy, prejudice or public sentiment.

As you consider these instructions, you should not single out instruction or a part of an instruction and ignore the remainder. Instead, you must consider all of these instructions as a whole and view each instruction in light of all of the others. Also, don't be influenced by the order in which the instructions are presented or by the manner in which I read them to you.

THE JURY' S DUTY

You are the only judges of the facts in this case. In other words, it is your responsibility to decide what the true facts are from all of the evidence which you have seen and heard.

Nothing which I may have said or done during this trial should be considered by you as an indication that I believe or disbelieve certain facts or witnesses. You should disregard any expression or action by me which would seem to indicate any opinion that I have on the facts.

The only evidence that you may consider are the sworn statements of the witnesses, the exhibits that you have been received in evidence and any facts stipulated by counsel.

You should consider all of the evidence whether it has been referred to by me or by the lawyers. As I have told you, the statements of counsel are not evidence unless all of the

lawyers stipulate or agree that a fact is true. When the lawyers stipulate a fact, you may accept that fact as true without the testimony of a witness or any exhibits.

In determining whether any fact has been proved in this case you may, unless I tell you otherwise, consider the testimony of all witnesses, no matter who called them and all exhibits received in evidence, regardless of who may have produced them.

Generally, there are two types of evidence from which you may properly find the truth in a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence which is the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. The law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts in accordance with all of the evidence in this case, both direct and circumstantial.

You are to consider only the evidence presented and you may not guess or speculate as to the existence of any facts in this case. But, you may draw from the facts which you find have been proved, such reasonable inferences as seem justified in light of your own experience.

At times throughout the trial, I have been called upon to pass on the admissibility of certain evidence which was offered. Don't be concerned with my rulings or the reasons for them because, whether evidence is admissible or not is a legal question. If I admit evidence to which an objection has been made, I do not determine what weight should be given to such evidence because that is your responsibility. If an objection was sustained, don't guess what the answer might have been or why the question was asked.

## CREDIBILITY OF WITNESSES

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of the evidence. As used in these instructions, the "credibility" of a witness means the truthfulness or believability of a witness. The "weight of the evidence" means the extent to which you are or are not convinced by the evidence. The number of witnesses testifying on one side or the other of an issue is not alone the test of the credibility of a witness or the weight of the evidence. If warranted, you may believe a single witness as against a number of witnesses who testify differently. The proper tests are how truthful was the witness and how convincing was his or her testimony in light of all of the evidence and circumstances shown.

In deciding whether the statements of a witness are truthful and convincing or not, you should carefully examine the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive and state of mind and his or her behavior and appearance while on the witness stand. You should also consider any relation each witness may have to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause the jury to disbelieve such testimony. Two or more persons who witness an incident may see or hear it differently, and innocent misrecollection, like failure of recollection, is not uncommon. Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses should be considered by you, but, in weighting their effect, you should consider whether they pertain to a matter of importance or to an unimportant

detail, and whether they result from an innocent error or a willful falsehood.

A witness may be discredited or impeached, not only by contradictory evidence, buy also by evidence that at other times the witness has made statements which are inconsistent with the present testimony of the witness. If you believe that any witness has made statements at other times which are inconsistent with the testimony given in this trial, then you should also consider whether the inconsistency results from an innocent error or from a willful falsehood and whether it pertains to a matter of importance or an unimportant detail.

After you have considered all of the factors bearing upon the credibility of a witness which I have mentioned, you may decide to believe all of the testimony of a particular witness, or you may accept or disregard any part of the testimony of a particular witness. In other words, you may give the testimony of any witness such credibility and weight, as you may think it deserves.

In considering a verdict you should take into consideration the fact that not all persons live to the age of expectancy for reasons unrelated to the injuries alleged in this case and other persons live beyond their normal life expectancy. The life expectancy tables that have been admitted in evidence are based on averages and are only an aid for you in your deliberations together with all of the other evidence in the case.

## EXPERT WITNESSES

The rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists as to persons referred to as "expert witnesses". These are witnesses who, by virtue of education or experience, have become more knowledgeable on a certain subject than the average person.

Witnesses who are recognized as experts may state their opinions about relevant matters and may give their reasons for the opinions. You should consider any expert opinions given in this case and give to such opinions such weight as you believe they deserve. In determining the weight to be given to the opinion of an expert you should consider the education, training and experience of the expert, the basis for the opinion, the reasons given by the witness and the opinions of other similar witnesses on the same matters as well as the rules generally applicable to all witnesses in this case.

## BURDEN OF PROOF

In order to recover damages, the plaintiff(s) must prove every element of his/their individual claims by a preponderance of the evidence. By a preponderance of the evidence means by the greater weight of the evidence. A fact is proved by a preponderance (or by the greater weight of the evidence) if you, the jurors, believe that it is more likely true than not true. The burden is also upon the defendant to prove by a preponderance of the evidence that the plaintiffs or any of them were negligent and that their negligence proximately contributed to their injuries.

## CLAIMS AND DEFENSES

Although in this trial you have heard evidence concerning the claims of several plaintiffs, you must weight the evidence you have heard concerning each plaintiff's claim individually. Therefore, you must listen to and apply each of the following instructions of law to each plaintiff's case individually. As you listen to these instructions, bear in mind that each instruction relates to each plaintiff's claim individually, and were therefore written to apply to each plaintiff individually.

The mere fact that a plaintiff brings a suit for damages in this Court in and of itself does not in any degree establish a right to such damages. The mere fact of initiating a suit at law

is not to be considered by you as establishing the right of a plaintiff to recover.

The mere fact that the plaintiff may have been exposed to some substance at work and that he may have contracted a condition or disease that results from such exposure does not in and of itself and, without more, make the railroad liable to the plaintiff or raise any presumption of negligence on the part of the defendant railroad.

Claims for job related injuries made by employees of railroad companies which are engaged in interstate commerce are governed by Federal law, specifically the Federal Employers' Liability Act. This law is commonly referred to as "FELA" and this shorthand reference will be used for convenience in these instructions.

The defendant, Norfolk and Western Railway Company, is the successor-in-interest and is responsible for the acts and omissions, if any, of the Virginian Railroad. Any reference in these instructions to Norfolk and Western or N&W should be understood to include the Virginian Railroad.

The defendant in this case, Norfolk and Western Railway Company is a corporation and can act only by its agents or servants. Therefore whenever mention is made of defendant doing or not doing something, it means that the defendant was acting through its agents or servants within the scope of their employment.

Section 1 of the Federal Employers' Liability Act (45 U.S.C. § 51), the law under which the plaintiff has brought this lawsuit, provides in part that:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for injury or death resulting in whole

> or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

It is agreed that, at the times and places alleged in the complaint, defendant N&W was a common carrier by railroad, engaged in interstate commerce; that each plaintiff was then an employee of defendant N&W, engaged in such commerce; and that the plaintiff's right, if any, to recover in this case is governed by the provisions of the Federal Employers' Liability Act.

Therefore, in order to recover damages under the FELA, the plaintiffs must prove by a preponderance of the evidence that the N&W was negligent and that the negligence proximately caused injuries to them. Under the terms of the Federal Employers' Liability Act, if you find by a preponderance of the evidence that the railroad company was guilty of any negligence whatsoever, and you further find from a preponderance of the evidence that such negligence contributed, however slightly, to the injury of the plaintiff, then your verdict must be in favor of the plaintiff and against the defendant railroad. There may be more than one cause to any injury, however, a plaintiff may recover from the defendant if it is established that negligence on the part of the defendant was a cause of the injury. For the purposes of this action, injury or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part in brining about or actually causing the injury or damage.

Under FELA, the employer is not held to an absolute responsibility for the safe condition of the workplace, but only to the duty of exercising reasonable care to that end, the

degree of care being commensurate with the danger reasonably to be anticipated.

Negligence is defined as the failure to do what a reasonable careful person would have done under the same or like circumstances, or the doing of something which a reasonably careful person would not have done under the same or like circumstances. In other words, negligence is the failure to exercise reasonable and ordinary care. Specifically, it was the duty of N&W to protect its employees from those hazards at the workplace that it knew or had reason to know of. This duty included the obligation to warn the employees, to provide protective devices and to take other reasonable steps to eliminate the possibility that its employees would be injured by the hazards.

In determining whether the defendant railroad knew or should have known that exposure to some substance would result in injury to the plaintiff, you may look to the evidence in this case bearing upon what has been referred to as the state of the art. The term "state of the art," as used in this case, means that knowledge that was reasonably available at any particular period of time concerning the dangers presented by exposure to asbestos or asbestos containing products.

The defendant railroad was not required to have known everything that is written in the medical or scientific journals. The defendant railroad was under the duty to take reasonable steps to know about available medical and scientific literature to determine the nature and effects of the substances to which its employees were exposed. The law presumes that a person, including a corporation, knows that which, by the use of ordinary care, he could have seen or known had he looked.

Under FELA it was the continuing and nondelegable duty of the Norfolk and Western Railway Company and Virginian Railroad to furnish plaintiff with a reasonably safe place in

which to work. By nondelegable, I mean that the railroads could not depend on a third party to satisfy their duty to furnish a reasonable safe place to work.

Some of the plaintiffs may have had exposure to asbestos at places other than those related to their employment with the Virginian and Norfolk and Western Railroad. If you find that the Railroad was negligent and dust exposures at the Railroad contributed, however slightly, to the plaintiff's injuries, you are not to make a deduction for the contribution of non-railroad exposures. The Court will make any deductions which may be appropriate to make.

Section 53 of FELA provides:

> In all actions brought against any such common carrier by railroad . . . to recover damages for personal injuries to an employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished . . . in proportion to the amount of negligence attributable to such employee. . .

Under this section, it was the continuing duty of the plaintiff to exercise reasonable and ordinary care for his own safety and protection. If you find that both the railroad and the plaintiff were negligent, and that their respective negligence was a proximate cause of plaintiff's alleged injury, then the plaintiff will not be barred from recovery, but his recovery will be reduced. To determine the amount of the reduction, you must compare the negligent conduct of the railroad and plaintiff in terms of percentages. You will attribute to each of them that percentage that you find describes or measures that party's negligent contribution to the happening of the injury.

In a FELA case, assumption of the risk is not a defense available to an employer. So, the fact that an employee may have known or could have known of an unsafe condition at

his workplace which resulted in injuries to him does not mean that the employee was contributory negligent.

## DAMAGES

The court instructs the jury that the fact that instructions are given you on the subject of damages should not be taken by you as an intimation on the part of the Court that the defendant is or is not liable for the alleged injury and damages complained of.

If you find that the defendant is liable to a plaintiff, you must then decide what amount of damages which you believe will fairly and adequately compensate the plaintiff for his injuries.

Each plaintiff who you have found to have been injured as a result of the fault of the defendant is entitled to recover for physical disability and physical and mental pain and suffering in the past; any disability and physical and mental pain and suffering that may reasonably be expected to occur in the future; any loss of enjoyment of the normal pleasures of life; and any medical expenses that may be reasonably expected to be incurred in the future.

You have heard a great deal of testimony regarding cancer and increased risk of cancer. This testimony is relevant only to judge the genuineness of plaintiffs' claims of fear of developing cancer. As an integral part of damages for mental pain and suffering, any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages your may award for pain and suffering. On the other hand none of plaintiffs have offered evidence that he actually has cancer or that he will, with reasonable certainty develop cancer in the future. Therefore, you cannot award damages to plaintiffs for cancer or for any increased risk of cancer.

In awarding damages, you should not reduce the amount of damages because you may have found a plaintiff contributory negligent. Any reduction of damages based on the negligence of the plaintiffs will be done by the Court.

## DELIBERATIONS AND VERDICT

Following the arguments of counsel, this case will be given to you for decision. Your first responsibility is to select a foreperson—one of your members who will preside over your deliberations and act as your spokesperson. Following this selection, you should carefully review the testimony and the evidence in order to decide the matters in dispute between the parties.

In order to reach a final verdict, your decision must be unanimous. It must likewise represent the considered judgment of each juror. So, it is your duty to consult with one another and to deliberate with a view to reaching an agreement.

If, after a fair and impartial review of the evidence and after hearing and giving due consideration to the opinions of your fellow jurors, you can reach a verdict which each of you individually and all of you as a jury believe is consistent with the law and the evidence, it is your duty to return such a verdict.

If, during your deliberations you should have a question, please write your question on a paper provided and give it to the bailiff. When you have reached a verdict, the Foreman should endorse your verdict on the appropriate forms and you should then tell the bailiff that you have completed your work and have reached verdict. Counsel, the parties and I will then gather to receive your decision.

Supreme Court, U.S.
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No. 00-1637

IN THE

# Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
*Petitioner*,

v.

HOMER DYE, *et al.*,
*Respondent*.

**On Petition for a Writ of Certiorari to the Circuit Court of Mingo County, West Virginia**

## BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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## BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 93 percent of its freight

[1] No person or entity other than AAR has made monetary contributions toward this brief and no counsel for any party authored this brief in whole or in part.

revenues, and employ 90 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). 45 U.S.C. § 51-60. In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted FELA as a tort-based remedy for railroad employees injured on the job, who, at that time, had little legal recourse. With the goal of providing a progressive and meaningful remedy, Congress lowered the then-existing common law barriers to recovery by abrogating the defenses of assumption of risk, the fellow servant doctrine and contributory negligence.[2] However, where Congress did not specifically alter the common law, the employee's remedy was to be consistent with common law principles.[3]

Subsequent to FELA's enactment, every state has enacted a workers' compensation law, under which the concept of assigning fault for workplace injuries is abandoned in favor of the principle that all employees suffering legitimate work-related injuries are deserving of compensation. Despite the advent of workers' compensation, FELA remains intact,[4] and

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[2] The defense of contributory negligence is eliminated in favor of comparative negligence by 45 U.S.C. § 53; the assumption of the risk defense by 45 U.S.C. § 54. *See also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916) (FELA abrogated the common law fellow servant doctrine.).

[3] *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543-44 (1994); *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 429 (1997); *See infra* p. 14.

[4] Under the Jones Act, which incorporates the substance of FELA by virtue of 46 U.S.C. § 688, seamen are covered by a fault-based compensation system. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

each year thousands of claims and lawsuits, like the case below, are asserted under FELA against AAR member railroads.[5]

In this case, the court permitted the plaintiffs, who alleged exposure to asbestos while employed at the defendant railroad, to argue to the jury that they were entitled to compensation for emotional distress resulting from their fear of contracting cancer in the future despite offering no evidence of any physical or emotional manifestation of their "fear." After receiving instructions from the court that it could compensate the plaintiffs for a "reasonable fear of cancer," the jury returned six-figure verdicts for each of five plaintiffs, all of whom were retired and therefore had no claim for lost wages. The court also instructed the jury not to make a deduction for any contribution to plaintiffs' injuries caused by non-railroad exposure (or other potential causes of plaintiffs' injuries), even though with respect to some plaintiffs there was evidence of significant potential exposure to asbestos at other jobs. [*See* Petition at 7] These instructions, denying the right to apportion damages, left the railroad exposed to damages for harm it did not cause.

Both issues on which petitioner seeks review arise with regularity in FELA litigation. Because, unlike workers' compensation employers, railroads are subject to uncapped damages under FELA, the manner in which these issues are addressed by lower courts impacts greatly on the amount of damages a railroad will be obligated to pay. The serious financial consequences that flow from this decision makes this case of utmost interest to AAR and its members.

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[5] From 1995 through 1999, nearly 33,000 FELA suits were filed. Data on railroads' FELA experiences are compiled from information provided to AAR by AAR members (and other railroads) in response to annual surveys.

## STATEMENT OF THE CASE

*Amicus* adopts the statement of the case in the Petition.

## SUMMARY OF THE ARGUMENT

The decision by the court below, which pushes railroad liability beyond FELA's intent, presents squarely for review two important issues arising under FELA. The first is whether FELA courts should follow the majority rule by requiring that claims for damages for negligent infliction of emotional distress be supported by evidence of physical manifestation or other corroboration of emotional injury. Because FELA suits alleging exposure to asbestos are common–and often include allegations that the plaintiff suffers from emotional distress due to fear of cancer–this issue will continue to confront lower courts.

The other issue arises from the court's instruction which disregarded the principle of apportionment of damages in the face of evidence that some of the plaintiffs had significant exposure to asbestos at non-railroad jobs. This ruling fails to follow this Court's teachings on FELA jurisprudence, and misreads earlier decisions of this Court. Beyond the serious consequence on the defendant at bar (a total verdict of nearly $2.3 million), this issue is important because it is not uncommon for railroad employees to seek compensation under FELA where there is evidence that causes independent of the railroad employer's conduct are responsible for the employee's disabling condition. Given the open-ended nature of damage awards under FELA, a ruling which makes railroads responsible for non-work-related health conditions has serious consequences for the entire railroad industry.

The West Virginia Supreme Court declined to consider these two important issues. However, despite coming from a state trial court, this Court should review this case because, as a by-product of FELA's broad jurisdictional provision,

plaintiffs can take advantage of liability-expanding decisions in a handful of jurisdictions by bringing large numbers of out-of-state cases in those courts. The case below, coming out of West Virginia, is a stark example of this phenomenon.

## ARGUMENT

### I. THE ERRONEOUS RULINGS BY THE WEST VIRGINIA COURT WILL HAVE A FAR REACHING IMPACT ON THE RAILROAD INDUSTRY

The court below ruled that the principle followed by the majority of lower courts, as a means of putting reasonable limits on the potential for "nearly infinite and unpredictable liability" when plaintiffs allege emotional injuries, is to be disregarded in cases arising under FELA. Not only did the court fail to follow the prevailing common law rule, but litigation practices under FELA all but assure that this case will be of far greater significance to the railroad industry than would appear: it has the potential to impact FELA cases arising over vast geographic areas.

#### A. FELA Suits Alleging Exposure To Asbestos Are Commonplace And Frequently Are Funneled Into A Few Selected Jurisdictions

Though FELA was enacted primarily to provide compensation to railroad employees for the physical perils of the job, *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994), injuries caused by occupational exposure to harmful substances also are compensable. *Urie v. Thompson*, 337 U.S. 163 (1949)(exposure to silica dust compensable). While perhaps not quite the rule, today, FELA claims alleging an injury due to long-term occupational exposure are far from the exception. Railroads are defendants in a substantial number of FELA cases in which occupational

exposure to asbestos has been alleged, with the plaintiff often seeking compensation for, among other things, negligent infliction of emotional distress, claiming a fear of contracting cancer at a future time.[6] In many cases, as in the case below, the plaintiff's sole evidence of emotional distress is nothing beyond his or her testimony about fear or concern of contracting cancer.

In addition to alleging exposure to asbestos, it is not uncommon for plaintiffs to claim that exposure to other allegedly harmful substances in the workplace has caused an FELA "injury." *E.g., Baker v. Norfolk & Western Ry.*, 514 S.E.2d 448 (Ga. App. 1999)(exposure to diesel exhaust allegedly caused cancer); *Savage v. Union Pac. R.R.*, 67 F.Supp.2d 1021 (E.D. Ark. 1999)(plaintiff alleged exposure to "large amounts of toxic substances."); *Schmaltz v. Norfolk & Western Ry. Co.*, 878 F.Supp. 1119 (N.D. Ill. 1995)(plaintiff alleged exposure to herbicides caused his reactive airway dysfunction syndrome). Whenever there is an allegation that the plaintiff has been exposed to a substance that has been linked to cancer there is a potential claim for damages for emotional distress due to fear of cancer. Thus, the kind of evidence that is necessary to sustain a claim for emotional distress arising from the plaintiff's fear of some day contracting cancer is a potential issue in numerous lawsuits.[7]

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[6] From 1995 through 1999, over 6000 FELA suits were filed against railroads alleging occupational exposure to asbestos. Asbestos suits accounted for about 18.5 percent of all FELA suits filed during that period. These suits often are filed by retired workers. Data compiled from AAR surveys of railroads. *See supra* note 5.

[7] On May 18, 2001, a complaint was filed against CSX Transportation on behalf of a "class" of "several hundred to several thousand workers" alleging exposure to "hazardous organic solvents" claimed to increase the risk of cancer. *Rice et al. v. CSX Transp., Inc.*, (Circuit Court of Marshall

Not only are a large number of FELA cases with the potential for such a claim being brought, significant numbers of these cases tend to be filed in a handful of jurisdictions deliberately chosen because of perceived advantages to FELA plaintiffs. This patent forum shopping is facilitated by the broad venue provision of FELA, under which railroads are subject to the jurisdiction of the courts in any district in which the railroad does business. 45 U.S.C. § 56.[8] As a result, a large number of suits may be filed in a single jurisdiction, despite little connection between the facts and circumstances of the underlying cases and the forum state.[9] Moreover, even though FELA is a federal statute, plaintiffs can ensure that FELA cases will be heard in state court if deemed advantageous. While there is concurrent jurisdiction between state and federal court, if the plaintiff chooses state court as the forum, the case cannot be removed. 28 U.S.C. § 1445(a).

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Cty., W. Va., filed May 18, 2001)(a copy of this complaint is lodged with the Court by *Amicus*).

[8] By the nature of their operations, the large railroads today do business in numerous states: Burlington Northern Santa Fe operates in 28 states; Union Pacific, Norfolk Southern and CSX each operate in 24 states. *See* Class I Railroad Annual Report to the Surface Transportation Board (Form R-1), submitted by each of these railroads pursuant to federal law.

[9] Some courts have held that FELA's venue provision justifies affording great flexibility to plaintiffs in selecting a forum, even beyond what might be appropriate for plaintiffs in general. *See Ford v. Burlington Northern R.R.*, 819 P.2d 169, 173-74 (Mont. 1991)(FELA "presents a justification for disparate treatment." *Id.* at 174.). In *Ford*, numerous out-of-state suits were filed in two particular Montana counties perceived to be favorable to plaintiffs, however, this Court declined to hold that the state's venue statute, which discriminated against out-of-state defendants, violated the Equal Protection Clause. *Burlington Northern R.R. v. Ford*, 504 U.S. 648 (1992). Under workers' compensation, venue is much more limited. A claim can only be brought in a forum that has a significant connection to the claim: for example, where the injury occurred or where the employment relationship was located. A. Larson & K. Larson, *Larson's Workers' Compensation Law*, § 143.01 (2000 ed.).

Consequently, a ruling by a single state court on an important issue arising under FELA can have far reaching effects. By channeling litigation into selected courts, plaintiffs can, and often do, take advantage of favorable rulings regardless of whether they reside, have worked, or claim to have been injured in the forum state. As a result, large railroads find a substantial portion of certain types of FELA claims being brought in a few select jurisdictions among the numerous states in which they operate, at levels far out of proportion with the number of its employees who live or work in that jurisdiction. [*See* Petition, Part III]

As demonstrated starkly by the Petition, West Virginia is a glaring example of this aspect of FELA litigation: there are 2,500 asbestos-related FELA suits pending in West Virginia, of which only a small percentage involves West Virginia resident plaintiffs. [*See* Petition at 27-28; Petitioner's Lodging].[10] Similarly, a few other jurisdictions which are considered favorable to plaintiffs have become magnets for FELA litigation.

A notorious example of this rampant forum-shopping occurred last year when a complaint was filed against a number of railroads in Jones County Mississippi by 990 plaintiffs alleging "exposure to asbestos and other hazardous substances." *Foster, et al. v. Kansas City Southern Ry. Co., et al.* (Civil Action No. 2000-141-CV9, Second Judicial District of the Circuit Court of Jones County, Mississippi, filed

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[10] Bringing cases from far and wide into West Virginia is nothing new. *See Norfolk & Western Ry. Co. v. Tsapis*, 400 S.E. 2d 239, 241 (W. Va. 1990)(921 FELA lawsuits brought in Brooke County, of which 704 involved non-West Virginia resident plaintiffs). Only about 3,000 railroad employees reside in the entire State of West Virginia. Association of American Railroads, *Railroad Facts* 57 (2000 ed.). Only six of the eighteen named plaintiffs in the *Rice* complaint, *see supra* note 7, reside in West Virginia; the others reside in Maryland, Kentucky and Georgia.

Sept. 27, 2000) (a copy of which is lodged with the Court by *Amicus*). Only about a quarter of the plaintiffs in this suit are Mississippi residents. Just as in the case below, the plaintiffs demand compensatory damages for "emotional upset, mental anguish . . . fear of cancer." In this suit brought in one Mississippi court, plaintiffs have sought to encompass practically the entire railroad industry.[11]

Not only does FELA's broad venue provision allows plaintiffs to choose from a wide range of forums, once a case is filed, it is relatively easy to keep it in the selected forum. For example, to keep FELA cases in St. Louis, a jurisdiction perceived to be favorable for plaintiffs, a St. Louis doctor often is retained to "treat" the plaintiff. This will usually be enough to defeat a forum non conveniens motion even if the plaintiff neither lives nor was allegedly injured in Missouri.[12]

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[11] Named as defendants in this case are the Alabama Great Southern R.R., the Birmingham Southern R.R., the Burlington Northern & Santa Fe Ry. Co., CSX Transportation, Inc., the Kansas City Southern Ry. Co., the Pennington R.R., the Mississippi Central R.R., the Norfolk Southern Ry. Co., the St. Louis Southwestern Ry., Union Pacific R.R. and the National Passenger Railroad Corp. (Amtrak).

[12] *E.g., Jacobs v. Union Pacific R.R.*, No. 002-07409 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(Plaintiff resides and alleges injury in Illinois); *Branham v. Norfolk Southern Ry. Co.*, No. 002-06966 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.) (plaintiff resides in Illinois, alleges injury in Indiana); *Pasley v. Union Pacific R.R.*, No. 002-06931 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(plaintiff resides and alleges injury in Arkansas); *Lennie v. Union Pacific R.R.* No. 002-07896 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(Plaintiff resides and alleges injury in Iowa). In all cases, the railroads' forum non conveniens motions were denied in March 2001, with the plaintiffs' receipt of medical treatment in St. Louis cited as a factor. (Copies of these orders are lodged with the Court by *Amicus*.)

### B. This Case Presents An Excellent Opportunity For This Court To Address An Important Issue Left Unresolved In *Gottshall* And *Buckley*.

As petitioner demonstrates, this case raises an important issue over which lower courts are divided [*See* Petition pp. 17-18] and continue to reach conflicting results. For example, in two FELA cases in which several plaintiffs alleged fear of cancer as the result of asbestos exposure, a federal district court in Georgia recently reached the opposite result from the court below. In granting the defendant's motion for summary judgment, that court adopted

> the rule that applies in the vast majority of American jurisdictions: recovery for a claim of negligent infliction of emotional distress requires a plaintiff, in addition to showing impact under *Buckley*, to make a further showing of objective manifestation of that distress.

*Dean, et al. v. CSX Transp., Inc.*, (S.D. Ga. 2000)(twelve plaintiffs)(unpublished order); *Heirs, et al. v. CSX Transp., Inc.*, (S.D. Ga. 2001)(six plaintiffs)(unpublished order) (copies of these orders are lodged with the Court by *Amicus*).

Though not ruling directly on the issue, the importance of addressing the question of what evidence is needed to sustain a claim for negligent infliction of emotional distress has been recognized by this Court in recent FELA cases. In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S.557 (1987), in response to concern raised by *amicus curiae* AAR that to permit a railroad worker to bring a FELA suit for an emotional injury arising from a condition that was subject to a grievance under the Railway Labor Act would inundate courts with "minor disputes" masquerading as FELA claims, this Court responded that AAR's concern "mistakenly assumes that a significant percentage of employees bringing grievances suffer the type of *severe* emotional injury that has generally been required to establish liability for purely emotional injury." *Id.* at 566, n.13. (emphasis supplied)

While *Buell* did not address whether "purely emotional injuries were cognizable under FELA," that question was subsequently answered by this Court in the affirmative, but limited to cases where the employee is in the "zone of danger" of physical impact. *Gottshall*, 512 U.S. at 554-57.

*Gottshall* defined the universe of employees who may recover damages for emotional injury under FELA. Three years later, in *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997), this Court held that an employee who was exposed to a substance (in that case, asbestos) that might cause a future disease, but who had no manifestation of any physical injury, was not within the zone of danger and could not recover for emotional injury. While the holding was limited to plaintiffs alleging exposure but manifesting no symptoms of disease caused by the exposure, the majority opinion, as well as Justice Ginsburg's concurring and dissenting opinion, highlighted some of the inherent problems courts inevitably face in dealing with claims of emotional distress.

The Court pointed out that the question at issue was "the existence and seriousness of [the plaintiff's] claimed emotional distress." 521 U.S. at 433-34. After noting that "contacts . . . with serious carcinogens are common", *id.* at 434, the majority opinion summarized the problem:

> But how can one determine from the external circumstances of exposure whether, or when, a claimed strong emotional reaction to an *increased* mortality risk (say, from 23% to 28%) is reasonable and genuine, rather than overstated–particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics? *The evaluation problem seems a serious one.* (emphasis supplied)

*Id.* at 435.

While Justice Ginsburg would not have limited recovery for emotional distress to employees within the zone of danger, *Gottshall*, 512 U.S. at 559 (Ginsburg, J., dissenting), her opinions in *Gottshall* and *Buckley* also recognize the importance of the issue raised by the case below. Justice Ginsburg concluded that the *Buckley* plaintiff was not entitled to damages for his alleged emotional injury because he "did not present objective evidence of severe emotional distress . . . . he sought no professional help to ease his distress, and presented no medical testimony concerning his mental health." *Buckley*, 521 U.S. at 445.[13] Justice Breyer's majority opinion in *Buckley*, describing the evidentiary problems that inevitably arise in the context of emotional distress claims, underscored the consistency between the majority opinion and Justice Ginsburg's concurrence in assessing these problems: "And Justice Ginsburg, too, . . . would limit recovery in emotional injury cases to those who can show more objective evidence than *simply having expressed fear and concern* to supervisors." 521 U.S. at 434. (emphasis supplied).

In its limited holding in *Buckley*, this Court clearly reserved the important question presented by the case below, recognizing that it would continue to vex courts grappling with these difficult cases. This case presents the Court with an opportunity to resolve this critical question relating to the compensability of emotional distress claims under FELA which remains unanswered by *Gottshall* and *Buckley*.

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[13] In contrast, Justice Ginsburg noted that in *Gottshall* "[b]oth workers suffered severe injury on the job, . . . Both experienced not just emotional, but physical distress [weight loss, insomnia, cold sweats, fatigue, headaches and sleepwalking] . . . both [plaintiffs] satisfy the 'physical manifestation' test endorsed by the Restatement of Torts." 512 U.S. at 568-69 (Ginsburg, J., dissenting).

## II. BY REFUSING TO GIVE AN APPORTIONMENT INSTRUCTION THE COURT BELOW MISINTERPRETED FELA AND EXPANDED RAILROAD LIABILITY WELL BEYOND THE STATUTE'S INTENT

This case raises a second critical, unresolved issue common under FELA. Again departing from the prevailing common law rule, the court below refused to recognize that in an FELA case, when there is evidence that causes other than the railroad's conduct contributed to the plaintiff's injury, the railroad should be liable for only the portion of the damages caused by its conduct. The trend toward FELA claims alleging occupational exposure to a harmful substance or condition has elevated the importance of the apportionment issue because often the health conditions allegedly caused by exposures at the workplace also may be caused by non-occupational factors or by non-railroad exposures.[14]

### A. Except Where Congress Specifically Altered The Common Law, FELA Is To Be Guided By Common Law Principles: Nonetheless, The Court Below Ignored the Fundamental Common Law Principle That A Defendant Is Liable Only For The Harm It Caused

In *Gottshall*, this Court issued a reminder of a long-standing tenet of FELA: that railroads are not "insurers of the

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[14] Several years ago another West Virginia court also declined to recognize the right of apportionment in a case where the plaintiff alleged occupational exposure to asbestos, but where there was evidence that the plaintiff's obstructive lung disease was caused, at least in part, by his heart condition, obesity and cigarette smoking. *CSX Transp., Inc. v. Sirbaugh*, unpublished order, *cert. denied*, 520 U.S. 1139 (1997). No doubt, one of the benefits to plaintiffs of filing so many cases in West Virginia is the strong likelihood of avoiding submission of the issue of apportionment to the jury.

safety of [their] employees." 512 U.S. at 543; *See also Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947). Nonetheless, in the case below, the trial court took a significant step in the direction of conferring "insurer" status on the railroad industry. The court's refusal to provide instructions on apportionment of damages–in fact, the court instructed the jury to disregard the principle of apportionment–renders railroads liable for damages suffered by employees that the railroad did not cause. In embarking on this path, the court ignored another well established and fundamental, yet oft forgotten, feature of FELA: that FELA jurisprudence is to be guided by common law principles. "[T]he 'merit' of a FELA claim . . . cannot be ascertained without reference to the common law." *Gottshall*, 512 U.S. at 551.

A fundamental principle of the common law is that defendants are liable only for damages that are attributable to their negligence, not for damages that are caused by other, independent acts or conditions. Where two or more causes have combined to harm a plaintiff, only one of which is attributable to the defendant's negligence, damages should be apportioned among those causes, assuming there is a reasonable basis for determining the contribution of each cause to the harm. *Restatement (Second) of Torts* § 433A.[15]

There is no reason apportionment should not apply to FELA cases; while some courts, like the court below, disregard this principle, others have adhered to it.[16] In *Dale*

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[15] Traditional common law rules of apportionment applied to divisible harms. The modern common law is evolving toward the concept of several liability even for indivisible harms, based on the principle that each party should be responsible only for the harm it caused. *See Restatment (Third) of Torts: Apportionment of Liability* §§ 17, B18 (2000); Petition at 25.

[16] *See* cases cited in the Petition at 21-24.

*v. Baltimore & Ohio R.R.*, 552 A.2d 1037 (1989), the Pennsylvania Supreme Court ruled that under FELA "liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused." *Id.* at 1041. The *Dale* court went on to hold that

> an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

*Id.*

In *Dale*, the plaintiff's injury was partially caused by exposure to asbestos on the job and partially by his pre-existing asthma. In this case, while there was an allegation of asbestos exposure while working for the defendant, there also was evidence that some of the plaintiffs were exposed similarly at other jobs, in some cases for a far longer period than their employment with the railroad. In *Dale*, the highest court in Pennsylvania corrected the erroneous reading of FELA by a trial court; in this case, the highest court in West Virginia has refused even to consider a similarly erroneous decision by a lower court.

### B. Neither The Language Of FELA Nor This Court's Prior Decisions Alter The Common Law Rules Of Apportionment

The ruling below represents a striking example of how some courts, by deviating from common law principles, have misinterpreted FELA. The refusal of some courts to recognize the principle of apportionment of damages often grows out of a misreading of prior decisions of this Court, most notably

*Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957).[17] In *Rogers*, after the Missouri Supreme Court reversed a jury verdict for a rail employee, this Court held that the language of § 51 of FELA requires submission of a case to the jury if "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 506. *Rogers* was clear that its holding pertained only to the test for a jury case.[18] There was no discussion of apportionment in *Rogers*, nor any suggestion that FELA was meant to hold a railroad liable for damages it did not cause.

*Rogers* and its progeny have virtually assured that under FELA, assuming some competent evidence is proffered, a jury, and not a judge, will decide whether the elements of a negligence case have been proved by the plaintiff. Ironically, the court below prevented a jury from assessing properly the level of damages for which a defendant may be liable, in contrast to other courts which have recognized the important role of the jury on this issue. *E.g., Sauer v. Burlington Northern R.R.*, 106 F.3d 1490 (10th Cir. 1997)("Although apportionment may be difficult, like comparative negligence it is a question for which juries are well suited." *Id.* at 1494.)

Misinterpretation of *Rogers* by lower courts is not merely of academic interest: it has very real and serious financial consequences for railroads. The purpose of FELA is to

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[17] *See Farmer v. Pennsylvania R.R.*, 311 F.Supp. 1074, 1077 (W.D. Pa. 1970) and *Denton v. Southern Ry.*, 854 S.W.2d 885, 888 (Tenn. App. 1993), both citing to *Rogers* as justification for denying apportionment.

[18] "This Court granted certiorari to consider the question *whether the decision invaded the jury's function.*" 352 U.S. at 501. (emphasis supplied); "At best, uncertainty as to the facts arises from the petitioner's testimony, and in that circumstance not the court, *but the jury*, was the tribunal to determine the fact." *Id.* at 504. (emphasis supplied).

provide a remedy for injuries suffered on the job due to the employer's negligence, not a broad insurance plan for rail workers.[19] Rulings that do not allow for apportionment of damages for causes other than the railroad's negligence blur that distinction and render railroads liable for damages they did not cause. This grafts an expensive insurance feature onto an already rich compensation system, under which damages for both pecuniary and non-pecuniary losses are virtually unlimited.[20]

This judicially created insurance feature is especially relevant in the current environment which has seen myriad FELA cases alleging occupational illnesses. *See supra* pp. 5-6. In these types of cases, independent factors frequently may cause part of the worker's disability. Rejection of the right to apportion damages prevents railroad defendants, where there is supporting evidence, from having the jury consider that a plaintiff's condition is largely the result of the independent causes: for example, where exposure to asbestos is alleged, to non-railroad exposures, smoking or a condition unrelated to occupational exposure, such as asthma; and where occupational hearing loss is alleged, to noisy hobbies (e.g., shooting) or presbycusis (age-related loss of hearing).

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[19] Under a separate federal statute, many rail employees can qualify for an occupational disability benefit if disabled, by any cause, from performing their railroad job. 45 U.S.C.§231a(a)(1)(iv). This unique benefit, which is part of the Railroad Retirement system, is not available to Social Security employees. Rail employees are also eligible for benefits for total disability, as are Social Security workers. 45 U.S.C. § 231a(a)(1)(v).

[20] A FELA verdict will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive).

By refusing to give jury instructions on apportionment generally recognized at common law, the court below expanded railroad liability under FELA far beyond the bounds that were intended by Congress. This case provides an excellent opportunity for this Court to correct that error and provide clear guidance to lower courts.

## CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Circuit Court of Mingo County, West Virginia in this case should be granted.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,

*Petitioner,*

*v.*

HOMER DYE, *et al.*,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Whether the lower court properly instructed the jury that it could award damages for fear of cancer in a FELA case if it found that the plaintiffs had sustained asbestos related injuries and that the plaintiffs' fear of developing cancer as a result of their asbestos exposure was reasonable?

Whether joint and several liability applies in FELA cases when the trial court determines that the alleged negligence of multiple tortfeasors resulted in a single, indivisible injury such as occupational pneumoconiosis?

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## STATEMENT OF THE CASE

### A. Introduction

This litigation involves five retired railway workers who brought FELA (Federal Employers Liability Act) lawsuits for occupational pneumoconiosis against their former employer, the Norfolk and Western Railway Company. These cases do not present a good vehicle for deciding the fear of cancer and apportionment of damages issues raised by the petitioner. Because of the general verdict forms used with the railroad's acquiescence, there is no way of determining how much, if any, of the damages were awarded for fear of cancer. The emotional distress claims presented by the plaintiffs were also much stronger than the railroad alleges.

Only two of the five plaintiffs had non-railroad exposure to asbestos. Even in those cases, the railroad exposure was far from "marginal." One of the plaintiffs with non-railroad exposure, Mellington Wheeler, settled with his non-railroad employer, Novamont, and the verdict against the petitioner was reduced by the amount of that settlement. To have employed *both* a settlement offset and some other means of apportioning damages would have resulted in "double dipping." The injuries suffered, mixed dust pneumoconioses, were properly found by the trial judge to be indivisible, and incapable of rational apportionment on the basis of causation. Even if the lower court had abandoned the doctrine of joint and several liability for multiple tortfeasors whose negligence combine to cause an indivisible injury, there was no evidence presented to establish any fault on the part of the non-railroad employers for purposes of apportioning damages. Thus, these cases present a poor vehicle for deciding apportionment issues.

The conflicts of authority alleged by the railroad are more apparent than real. The cases it cites in support of a "physical manifestation" requirement in emotional distress cases are factually distinguishable and almost all of them predate this Court's opinions in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) [Gottshall] and *Metro-North Commuter RR v. Buckley*, 521 U.S. 424 (1997) [Metro-North]. The cases it cites for apportionment of damages do not involve multiple tortfeasors whose negligence was found by the trial court to cause an indivisible injury, which is the type of injury alleged here.

The holdings of the lower court were correct and consistent with similar rulings in many other jurisdictions. Furthermore, the petition exaggerates the impact of the trial court's rulings, and the importance of West Virginia as a forum for FELA cases, while incorrectly asserting that the Supreme Court of Appeals of West Virginia does not review cases such as these.

**B. Occupational Exposure**

At trial, all of the plaintiffs testified about their exposure to asbestos and other toxic airborne contaminants, as well as their employer's failure to provide them with breathing protection or warn them about the hazards of exposure to airborne dust. Although the railroad asserts at page 7 of the petition that Mr. "Wheeler testified at trial that he was not aware of having been exposed to asbestos at N&W," that simply is not true. According to Mr. Wheeler's trial testimony, as a fireman and engineer on steam locomotives, he continually rode in cabs where the boiler head was covered with asbestos, and the steam lines were also insulated. Trial Transcript (7/29/98) at 74-84, 113, 149-50. When the

asbestos was bumped, chunks would fall to the floor, creating dust when they hit. *Id.* at 75, 80. If the ride was bumpy, asbestos would fly all over. *Id* at 76. Wind from the open windows would also stir up the dust. *Id* at 78.

Two of the plaintiffs, Mellington Wheeler and Leo Thacker, were exposed to asbestos at non-railroad, as well as railroad jobs. After leaving his railroad employment, Mr. Wheeler worked at a chemical plant from 1961 to 1992. Even the railroad's industrial hygienist did not think that this non-railroad exposure was significant, testifying that he did not see any "meaningful opportunity for [Mr. Wheeler] to have high exposure there sufficient to have caused disease. . . . from asbestos or silica . . ." Trial Transcript (7/31/98) at 125. Subsequent to his railroad employment, Mr. Thacker worked on various new construction projects where he may have had some limited exposure to asbestos, but he testified that his asbestos exposure would have been much greater on the railroad than on his other jobs. Trial Transcript (7/24/98) at 234, 274-75. The railroad did not identify the negligence of any third parties as a defense in its Answers or Amended Answers to the Complaints, nor did it seek to add any third party defendants to these lawsuits, or make any effort to obtain contribution from any third parties. Nor did it put on any evidence to show that the non-railroad employers were negligent.[1]

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1. If petitioner's counsel believed that some ruling by the trial court prevented them from presenting such evidence, they needed to vouch the record to preserve the issue for appellate review. *Finley v. Norfolk and Western Railway Co.*, 540 S.E.2d 144 (W. Va. 1999) (per curiam); *Torrence v. Kusminsky*, 408 S.E.2d 684 (W. Va. 1991).

## C. Medical Evidence

At trial, none of the parties called any treating doctors to testify, although both sides relied on medical records from treating physicians and called various expert witnesses to the stand. Dominic Gaziano, M.D., a Board Certified Pulmonologist and NIOSH Certified B-Reader, testified that each of the plaintiffs suffered from a mixed dust pneumoconiosis (including asbestosis and silicosis), that their pneumoconioses had been caused, at least in part, by their occupational exposure to asbestos, silica and other toxic dusts on the railroad and that pneumoconiosis can progress to the point where it renders one a respiratory invalid. Trial Transcript (7/24/98) at 32, 42-43, 46, 50, 56, 57, 63, 187-88. Furthermore, because of their occupational exposure to toxic dusts, the plaintiffs were at greater risk of developing lung cancer (which has a mortality rate of 85-90%) and mesothelioma, a painful, almost invariably fatal cancer of the pleural lining. *Id.* at 53-5. In his opinion, people with occupational exposure to asbestos, silica and coal dust should have real concern about developing cancer. *Id.* at 54.

Arnold Brody, a prominent scientist who studies lung pathology, testified about his research concerning the effects of asbestos fibers on the lung. He opined, among other things, that for non-smokers exposed to asbestos, there is a five-fold increase in the risk of developing lung cancer. Trial Transcript (7/23/98) at 188. Smokers exposed to asbestos have a synergistic risk of developing lung cancer, which means that the risk of developing cancer is multiplicative, rather than additive. Thus, one pack per day smokers exposed to asbestos have a risk of developing lung cancer that is fifty times greater than nonsmokers with no occupational exposure to asbestos. *Id.* at 163, 188.

On cross-examination, Dr. Renn, the defendant's chief medical expert, agreed that asbestos was a mutagen, Trial Transcript (8/18/98) at 25, that all of the plaintiffs were at risk of developing mesothelioma because of their occupational exposure to asbestos, *id.* at 51, that asbestos can cause lung cancer in people with asbestosis, *id.* at 25, Trial Transcript (8/17/98) at 172, and that 30-39% of all people with asbestosis will develop lung cancer. Trial Transcript (8/18/98) at 51.

Ray A. Harron, M.D., a board certified radiologist and NIOSH - certified B-reader, testified that all of the plaintiffs had x-ray changes consistent with asbestosis. Trial Transcript (8/18/98) at 133, 134, 137, 159, 160, 161-64. He also testified that asbestosis was an insidious, progressive, incurable disease, and that exposure to asbestos increased the risk of developing mesothelioma, lung cancer and various gastrointestinal cancers, *Id.* at 163, 164, with a five-fold increase in the incidence of lung cancer. *Id.* at 164.

None of the plaintiffs were current smokers. Two of the plaintiffs, Homer Dye and Jethro Walker, never smoked. Mr. Walker had crackles, a mildly reduced diffusing capacity and mildly reduced lung volumes which are classic signs of asbestosis. Even the defendant's chief medical expert, Dr. Renn, considered Mr. Thacker who smoked for 10 years but quit prior to 1946 to be a "non-smoker". Trial Transcript (8/18/98) at 44. Jack Lambert stopped smoking in 1978, long enough ago that his risk of developing lung cancer as a result of smoking had almost declined to that of a person who had never smoked. *Id* at 44, 49, 50. Mr. Wheeler quit smoking in 1992.

**D. Lay Testimony Concerning Physical And Emotional Injuries**

The late Mellington Wheeler testified that he suffered from shortness of breath that was getting worse. Trial transcript (7/29/98) at 97. As a result, he gave up hunting, fishing, golfing and officiating high school football games. *Id.* at 98. He was advised to walk for the sake of his heart, but could not because of his breathing problems. *Id.* at 75. He sat in the car while his wife shopped. *Id.* at 99. He was concerned about his future health because of his dust exposure and afraid he would die. *Id.* at 99. He was aware of his increased risks of lung cancer and mesothelioma, and thought about it all the time, including the middle of the night when he could not breathe properly. *Id.* at 100-01.

Jack Lambert's testimony disclosed that he suffers from shortness of breath, considers difficulty breathing to be his most serious health problem, no longer hunts, fishes or mows his lawn, hums in church instead of singing, rests when his wife is in the mall, is not as active as other people his age, is worried and afraid about getting cancer, worries about his shortness of breath, and is concerned about what would happen to his wife, who can't drive, if something happened to him. Trial transcript (7/29/98) at 195-202, 241. He is aware of his increased risk of developing cancer and often talks to his wife about his concerns.

Leo Thacker testified that he is aware of his risk of developing mesothelioma, that his lungs keep him up at night, that he has trouble breathing and going up and down stairs, that he cannot hunt with his grandchildren or walk up hills anymore, that he uses Ventolin and a fog machine, that his family doctor said he had asbestosis, that he is concerned

about his future health and about his wife, children and grandchildren, and that he gave up gardening and mowing the grass. Trial transcript (7/29/98) at 237-241, 270, 273. Because of his religious beliefs, Mr. Thacker is not "afraid" of getting lung cancer, but he is "concerned" about the possibility of developing that disease, not just for his own sake, but for that of his wife, children and grandchildren. *Id.* at 240, 241. The railroad's argument that Mr. Thacker should not be allowed to recover for his emotional distress because he described it as "concern" rather than "fear" has no merit.

Jethro Walker testified that he has shortness of breath, cannot work anymore, has trouble climbing stairs and sleeping, does not have much of a garden, worries about his health because of asbestos and his dust related lung disease, has discussed the risk of lung cancer with his family doctor, is bothered by the fact that a good friend who was exposed to asbestos as a welder died from lung cancer, does not fish any more and thinks about asbestosis and getting lung cancer because of his asbestos exposure. Trial transcript (7/29/98) at 286-88, 307, 317.

Homer Dye testified that he suffers from shortness of breath, that his lungs are getting worse, that he cannot do what he used to, that he cannot work around his house anymore (he used to clean gutters and paint), that he used to mow his yard in 30 minutes, but now it takes an hour or more, that he cannot climb hills anymore and has given up hunting and fishing, that he worries about getting cancer, and that he worries about how his elderly sister, who lives with him and suffers from cancer, will get along if he also develops cancer and is no longer able to care for her. Trial transcript (7/22/98) at 228-30, 235, 247.

**E. Judgment**

On March 8, 1999, after deducting offsets for settlements with Novamont and various manufacturers of asbestos products, the Circuit Court of Mingo County, West Virginia, entered judgment in favor of all plaintiffs. On or about March 22, 1999, the defendant, Norfolk Southern Railway Company, successor in interest to the Norfolk & Western Railway Company, filed a motion for judgment as a matter of law or in the alternative, for new trial or remittur. The lower court entered an order denying this motion on September 23, 1999. Unfortunately, Mellington Wheeler, who died of respiratory failure on September 10, 1999, did not live to see this order entered.

## REASONS FOR DENYING THE WRIT

### I. These Cases Provide A Poor Vehicle For Deciding The Issues Raised By Petitioner.

On each verdict form, the jury indicated that the negligence of the Norfolk and Western Railway Company had caused or contributed to a "work related dust disease," a finding amply supported by the evidence. The verdict forms used in these cases do not indicate the amount of damages, if any, awarded for fear of cancer or other emotional distress. The only question pertaining to damages on these forms asked the jury: "What amount do you find will reasonably compensate the plaintiff [NAME], for the loss he has suffered and will suffer in the future because of his work related lung injury?" *See* Respondents' Lodging at L-96. Under W. Va. R. Civ. P. 49, the jury could have been asked to award sums for each element of damages. The railroad, however, did not request a more detailed verdict form, or object to the form used. In fact, the parties agreed to the verdict form. Trial

Transcript (8/18/98) at 134, 72. Given these general verdicts, it is impossible to tell what amount of damages, if any, was awarded for emotional distress in general, or fear of cancer in particular. Consequently, these cases do not provide a good vehicle for deciding the fear of cancer issue raised by petitioner. In this regard, it should also be noted that the emotional distress claims presented by the plaintiff are much stronger than the petitioner makes them out to be.

The mixed dust pneumoconioses suffered by the plaintiffs are classic examples of "indivisible" injuries which cannot be rationally apportioned on the basis of causation. Moreover, even if the lower court had abandoned the doctrine of joint and several liability, there would have been little or no evidence to apportion damages on the basis of fault. Only two of the five plaintiffs had asbestos exposure at non-railroad jobs, and even in those cases, the railroad exposure was not "marginal" as alleged by the railroad. One of the plaintiffs with non-railroad asbestos exposure, Mellington Wheeler, settled with his non-railroad employer, Novamont, and the petitioner was given the benefit of an offset for that settlement. To have employed *both* a settlement offset and apportionment would have unduly reduced the petitioner's liability. Once again, these cases present a poor vehicle for deciding the issue presented.

## II. The Alleged Conflict Of Authority Concerning Damages For Emotional Distress Is Based On Factually Distinguishable Cases, Most Of Which Predate This Court's *Gottshall* and *Metro-North* Decisions

The railroad asserts that there is a split of authority in the lower courts as to whether or not damages for emotional distress can be awarded in FELA cases absent some form of manifestation, presumably either physical symptoms or a medical diagnosis. On the "manifestation" side, it cites four FELA cases, two Jones Act cases and a state law tort action. On the other side it cites the Second Circuit's decision reversed by this Court in *Metro-North*.

In one of the "manifestation" cases referred to by the railroad, *Haggerty v. L&L Marine Serv., Inc.*, 788 F.2d 315, 317-18 (5th Cir.), *reh' g en banc denied*, 797 F.2d 256 (5th Cir. 1986), the Court actually rejected "physical manifestation" of emotional distress as a prerequisite to recovery. In another case cited by the railroad, *Bullard v. Central Vermont Railway, Inc.*, 565 F.2d 193 (1st Cir. 1977), the plaintiff hurt his foot in a train collision, but the emotional distress he sought to recover for did not involve any fear of future illness or injury resulting from the accident.

None of the other FELA or Jones Act "manifestation" cases cited by the railroad involve a plaintiff who had suffered a significant physical injury such as asbestosis. *See Martinez v. Bailey's Louisiana, Inc.*, 244 F.3d 477 (5th Cir. 2001) (sexual harassment case where plaintiff's counsel waived any claim of physical injury); *Moody v. Maine Central RR Co.*, 823 F.2d 693 (1st Cir. 1987) (railway employee failed to establish that employer's harassment

caused his angina attacks and general fatigue); *Alabama Great Southern RR Co. v. Jackson*, 587 So. 2d 959 (Ala. 1991) (supervisors hiding in locomotive bathroom at 2 a.m. frightened train crewman); *McMillan v. National Railroad Passenger Corp.*, 648 A.2d 428 (D.C. 1994) (decided under D.C. rather than federal law) (uninjured plaintiff failed to show more than a minimal or negligible threat of harm, so he was never in the zone of danger) (court states in dicta that emotional distress must be "serious and verifiable" but does not explain what proof is required). Consequently, these cases tell us nothing about whether the issuing courts would require some "manifestation" of emotional distress in FELA cases where, as here, the plaintiffs *have* been physically injured.

Moreover, the cases cited by the petitioner tell us virtually nothing about how the lower courts are interpreting this Court's holdings in *Gottshall* and *Metro-North* because most of them predate one or both of those decisions. Three of the FELA cases and one of the Jones Act cases cited by the railroad in favor of a manifestation requirement predate *both Gottshall* and *Metro-North*, while the fourth FELA case predates only *Metro-North*. The only FELA or Jones Act case cited by the railroad which was decided *after* both *Gottshall* and *Metro-North* is *Martinez v. Bailey's Louisiana, Inc.*, 244 F.3d 474 (5th Cir. 2001) in which the plaintiff "did not [even] plead negligent infliction of emotional distress" as a cause of action. *Id.* at 477 n.2. Moreover, Martinez's counsel waived any claim of physical injury, either as an event precipitating emotional distress or as a result of emotional distress. Consequently, the court acknowledged it did not have an opportunity to address the zone of danger rule adopted in *Gottshall*. *Id.*

## III. The Alleged Conflict Of Authority Concerning Joint And Several Liability Is Not Based On Cases, Such As This One, Involving Multiple Tortfeasors Whose Combined Negligence Resulted In Indivisible Injuries

The railroad asserts that there is a split of authority concerning whether damages in FELA cases should be apportioned, with six cases from five courts approving apportionment and four cases rejecting it. This alleged conflict is more apparent than real. None of the purportedly "pro-apportionment" cases cited by the railroad involve the joint and several liability of multiple tortfeasors whose negligence was held to result in a single, "indivisible" injury. Instead, they involve pre-existing conditions and/or separate and discrete injuries, apparently none of which were found to result in "indivisible" injuries. *See Sauer v. Burlington Northern Railroad Co.*, 106 F.3d 1490 (10th Cir. 1997) (two separate railroad injuries to back and pre-existing conditions of degenerative changes of lumbar vertebrae and abnormal curvature of spine); *Varhol v. National Railroad Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990) (per curiam) (alleged aggravation of pre-existing MS by train derailment); *Akers v. Norfolk and Western Railway Co.*, 417 F.2d 632 (4th Cir. 1969) (upholding against railroad challenge a jury instruction stating that the railroad was not responsible for pre-existing conditions it neither caused nor aggravated); *Shupe v. New York Central System*, 339 F.2d 998 (7th Cir. 1965) (shoulder injury and back injury resulting from separate injuries on railroad); *Gustafson v. Burlington Northern Railroad Co.*, 561 N.W.2d 212 (Neb. 1997) (given general verdict for plaintiff, trial court did not commit reversible error in giving instruction on aggravation of pre-existing injury that failed to say that if the jury could not

determine how much of the plaintiff's current condition was due to aggravation, it should award damages for the entire condition); *Dale v. B&O*, 552 A.2d 1037 (Pa. 1989) (disability resulting from lifelong asthma and occupational asbestosis) (court did not determine "whether the evidence permits apportioning damages, or whether apportionment would be mere speculation, and whether plaintiff or defendant has the burden of proving the proportion of damages allegedly caused by B&O . . .")[2] None of the "pro-apportionment" cases cited by the railroad even discuss the joint and several liability of multiple tortfeasors for indivisible injuries, let alone say they are abandoning this rule. The failure of the petitioner to cite a single case rejecting joint and several liability in multiple tortfeasor situations is striking.

## IV. Petitioner Exaggerates The Impact Of The Lower Court's Ruling And The Importance Of West Virginia As A Forum

Contrary to the railroad's assertions, West Virginia is not "the venue in which virtually all" asbestos-related litigation against Norfolk Southern and CSX is brought.[3] Nor is it likely

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2. The current status of the *Dale v. B&O* holding is unclear because of a recent decision by an intermediate appellate court in Pennsylvania holding that Conrail was responsible for the entire amount of damages for the plaintiff's carpal tunnel syndrome, although the railroad presented evidence that other activities, such as push-ups, could have been a contributing factor. *McDermott v. Consolidated Rail Corp.*, 768 A.2d 348, 352-53 (Pa. Super. Ct. 2001).

3. The railroad relies on certain materials contained in its lodging that were not part of the record below. Respondents believe this lodging should be stricken. Should the Court find it appropriate to review petitioners' lodging, however, they ask the court to review respondents' lodging as well.

that the lower court's ruling on fear of cancer claims and joint and several liability "will control the asbestos-related liability of the two major eastern railroads, Norfolk Southern and CSX. . . ." This is far too much influence to attribute to a single order penned by a single judge sitting in a single trial court in one of the many states in which the petitioner operates. In fact, there is no way that the ruling of the lower court, standing by itself, could possibly control the outcome in all of the petitioner's other asbestos cases, unless one believes that all of the existing litigation in other courts, and all those cases that might be brought in the future, could somehow be transferred to, or filed in, the Circuit Court of Mingo County, West Virginia, and that Judge Thornsbury, the only judge sitting in that circuit, inundated by a flood of non-resident claims, would deny any forum *non conveniens* motion presented by the railroad. Of course, that is not going to happen.

In an effort to magnify the importance of the lower court's ruling, the railroad asserts that "[t]he West Virginia Supreme Court has made it clear that it will not grant a petition for appeal in these types of cases." Its petition does not explain what constitutes "these types of cases" or how the Court "makes it clear" that it would not review such cases on appeal.[4] If the railroad is talking about FELA cases in

4. Although there is no appeal of right in civil cases, the Supreme Court of Appeals of West Virginia accepts a high percentage of petitions for appeal. Under its original jurisdiction, the Court also rules on many issues raised by extraordinary writs such as mandamus and prohibition. In 1999, the most recent year for which statistics are available, the Court granted 40.5% of the 3,090 petitions for appeal and extraordinary writ it considered. 1999 Statistical Report, Supreme Court of Appeals of West Virginia. More

(Cont'd)

general, then its assertion is certainly incorrect, because that court has frequently resolved appeals and writs arising from FELA litigation and in many cases has ruled in favor of the railroad.[5] If the railroad is talking about "asbestos" cases, the assertion is also incorrect, because that court has reviewed asbestos litigation on many occasions.[6]

As noted below, the lower court's rulings on fear of cancer claims and joint and several liability are consistent with the position taken on those issues by numerous courts in other jurisdictions. Moreover, in choosing a venue in which to file suit, plaintiffs' counsel have many factors to

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specifically, it granted 30% of the 456 petitions for appeal it considered in civil cases. *Id.* To put these figures in perspective, "[o]n average, all state courts of last resort granted only 10 percent of discretionary petitions considered in 1997." *Id.*

5. *See, e.g., Finley v. Norfolk and Western Railway Co.*, 540 S.E.2d 144 (W. Va. 1999) (per curiam) (upholding on appeal a lower court ruling that denied the plaintiff's motion for new trial); *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473 (W. Va. 1997) (upholding on appeal a summary judgment and directed verdict in favor of the railroad); *Norfolk and Western Railway Co. v. Tsapis*, 400 S.E.2d 239 (W. Va. 1990) (writ of prohibition) (holding that doctrine of forum *non conveniens* applies in FELA cases).

6. *See, e.g., Marlin v. Bill Rich Const., Inc.*, 482 S.2d 620 (W. Va. 1996); *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300 (W. Va. 1996); *In Re State Public Bldg. Asbestos Litigation*, 454 S.E.2d 413 (W. Va. 1994); *Abbott v. Owens-Corning Fiberglas Corp.*, 444 S.E.2d 285 (W. Va. 1994); *State ex rel. CCR Ltd. v. MacQueen*, 441 S.E.2d 658 (W. Va. 1994); *Davis v. Celotex Corp.*, 420 S.E.2d 557 (W. Va. 1992); *State ex rel. H.K. Porter Co. v. White*, 386 S.E.2d 25 (W. Va. 1989).

consider in addition to how the forum court has ruled, or may rule, on those two particular issues. For example, counsel must consider how congested the court system is, what kind of jury may be empaneled, how convenient the forum will be to an often elderly or infirm client who finds it difficult to travel, how accessible witnesses will be, the procedural and evidentiary rules of the forum, and the possibility that the chosen forum may dismiss a non-resident's claim on forum *non conveniens* grounds. Indeed, West Virginia's courts have frequently dismissed FELA cases pursuant to such motions, as evidenced by respondents' lodging, which includes 15 dismissal orders. In addition, many law firms based in West Virginia, including respondent's counsel, have frequently filed FELA cases in other states such as Virginia, Kentucky and Ohio, and many firms based in surrounding states have never filed a single FELA case in West Virginia.

The cases at bar certainly do not illustrate the problem alleged by Petitioner, because they do not involve a mass filing by non-resident plaintiffs seeking a more friendly forum than their home states. These five consolidated cases were tried in Williamson, West Virginia, and all of the plaintiffs had strong connections with the forum state. The lead plaintiff, Homer Dye, was born in Williamson, West Virginia and has lived there all his life. He worked for the Norfolk and Western for forty-three years and seven months, all but three months of which he worked out of the Williamson, West Virginia yard (the remaining three months were at Matewan, West Virginia). Mellington Wheeler was born in Milton, West Virginia and lived in Ceredo, West Virginia at the time of trial. He worked for the Norfolk and Western from 1955 to 1961 as a fireman and engineer at the Kenova, West Virginia yard. Jack Lambert had lived for

nineteen years at Delbarton, West Virginia when these cases went to trial. Before that, he lived at Thacker, West Virginia. He worked for the railroad at various locations in West Virginia, including Thacker, McCarr, Matewan, Panther and Williamson. Jethro Walker was a lifetime resident of Ode, West Virginia, who hired in with the railroad at Besoco, West Virginia, and worked on the New River Division, which included much of Southern West Virginia. Leo Thacker was living in Rome, Ohio, at the time of trial, but he was born in Huntington, West Virginia and grew up in Wayne County, West Virginia. As a maintenance of way laborer, he worked on a number of sections, including one that extended from Portsmouth, Ohio to Norfolk, Virginia. At least part of his work for the railroad and resulting asbestos exposure was in Williamson, West Virginia, where he worked on track near the roundhouse.

In its petition, the railroad notes that there were approximately 2,500 asbestos-related railroad cases filed in West Virginia according to an administrative order filed by the Supreme Court of Appeals on December 28, 2000. The petition does not indicate, however, how many of those 2,500 plaintiffs were West Virginia residents, nor how many of the non-resident plaintiffs had worked for the railroad in West Virginia. Nor does it give the reader any basis for comparing this figure to the asbestos-related caseload in other states. Because railroads have historically been a major employer in many West Virginia counties, it should come as no surprise that this state has a significant FELA caseload. In fact, the C&O, a predecessor to CSX, maintained what was widely acclaimed as the largest steam locomotive repair facility in the world at Huntington, West Virginia. The Norfolk and Western Railway Company and the Virginian Railway, predecessors in interest to today's

Norfolk Southern Railway Company, also maintained track and facilities in a host of West Virginia communities, including Bluefield, Logan and Williamson.

The railroad cites four mass filings of FELA claims in the Northern Panhandle of West Virginia by a law firm from Pittsburgh, Pennsylvania. Although the railroad notes that many of these plaintiffs were non-residents, it does not indicate how many of the non-residents worked for the railroad in West Virginia at some point in time, or whether any forum *non conveniens* motions were filed. Without this information, the significance, if any, of the mass filings is at best unclear.

## V. The Rulings Of The Lower Court Were Correct

### A. Emotional Distress

Because all respondents suffered significant injuries from their occupational exposure to asbestos and silica, two widely recognized human lung carcinogens, the trial court properly instructed the jury that it could award damages for emotional distress, including fear of cancer. Its ruling was consistent with this Court's *Metro-North* decision, which held that a person exposed to a toxic substance such as asbestos cannot recover damages for fear of cancer unless and until he "manifests symptoms of a disease." 521 U.S. at 427. In this case, all respondents have been diagnosed with a mixed dust pneumoconiosis, including asbestosis and silicosis, thus meeting that requirement. This Court has never required a plaintiff who currently suffers from a compensable injury or illness to also establish a physical manifestation of his emotional distress, nor should it, although invited to do so in both *Gottshall* and *Metro-North*. In fact, in *Metro-*

*North*, this Court recognized that "[c]ommon law courts do permit a plaintiff who suffers from a disease to recover for related negligently caused emotional distress . . .", 521 U.S. at 432, and that "[t]he law, . . . does permit recovery for emotional distress where that distress accompanies a physical injury, . . ." *Id.* at 429-30. It also distinguished *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc.2d 11, 507 N.E.2d 476, 480-81 (1987), which allowed the recovery of damages for fear of cancer, as a case involving an "asbestosis-afflicted plaintiff" who "fell within a category where the law already permitted recovery for emotional distress." 521 U.S. at 437.

In its decisions concerning emotional distress damages in FELA cases, this Court has looked for guidance to the common law. Historically, plaintiffs who suffered a physical injury or illness have been allowed to recover damages for emotional distress related to their injuries or the conduct which caused them. *See* Restatement (Second) of Torts § 456 (1965) ("Emotional Disturbance Resulting From An Actionable Injury Or The Conduct Which Caused It").

Many state and local courts have allowed fear of cancer claims in cases involving asbestosis or asbestos related pleural disease without requiring any physical manifestation of emotional distress. *See, e.g.*, *Dunn v. HOVIC*, 1 F.3d 1362, 1367 (3d Cir. 1993); *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83-85 (3d Cir. 1986); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 413-14 (5th Cir. 1986) (en banc); *Griffin v. Keene Corp.*, No. 85 C 10748, 1990 WL 93292 (N.D. Ill. June 19, 1990); *Mauro v. Owens Corning Fiberglas Corp.*, 542 A.3d 16 (N.J. Super. 1988); *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc.2d 11, 507 N.E.2d 476 (C.P. 1987); *Eagle-Picher Industries, Inc. v. Cox*, 481

So. 2d 517, 526-29 (Fla. Dist. Ct. App. 1985); *Denton v. Southern Railway Co.*, 845 S.W.2d 885, 888-89 (Tenn. Ct. App. 1993) (FELA).

Allowing railway employees who suffer from asbestosis or related diseases to recover damages for a reasonable fear of developing cancer does not "open the floodgates," a concern expressed in this Court's earlier emotional distress cases. Accordingly, such claims are permitted under FELA in keeping with its remedial and humanitarian purposes.

**B. Joint And Several Liability**

Given the indivisible nature of the lung diseases of Respondents Wheeler and Thacker (the only cases arguably involving non-railroad exposure), the lower court did not err in applying joint and several liability, even though there may have been asbestos exposure at other job sites. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094-96 (5th Cir. 1973) (asbestosis is an indivisible injury); Restatement (Second) of Torts § 433A, comment i (1965) (damages for most personal injuries cannot be apportioned), Trial transcript (7/24/98) at 49 (testimony by Dr. Gaziano that one has to consider the cumulative effect with dust diseases because all exposures contribute to the disease).

FELA provides that a carrier is responsible for any injury caused, in whole or in part, by its negligence. 45 U.S.C. § 51. FELA provides no grounds for diminishing that responsibility other than the contributory negligence, if any, of the employee. *See* 45 U.S.C. § 53. This statutory language is reinforced by the common law.

At common law, multiple tortfeasors whose negligence combined to cause a single, indivisible injury were jointly and severally liable for the plaintiff's loss. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n.8 (1979); Restatement (Second) of Torts §§ 875, 879 (1977); Restatement of Torts §§ 875, 879 (1939); Dan B. Dobbs, *The Law Of Torts* § 390 at 1091 (2000). It was the function of the judge, rather than the jury, to determine whether an injury was divisible or indivisible. Restatement (Second) of Torts § 434 (1965). If a party believed that apportionment of damages was appropriate, it had the burden of proving what portion of the damages it should be responsible for. Restatement (Second) of Torts § 433 B (2) (1965). When Congress enacted FELA, it did not abolish the common law doctrine of joint and several liability. Over the many years since FELA was passed, state and federal courts have frequently recognized that multiple tortfeasors who cause an indivisible injury are jointly and severally liable to the plaintiff.[7] Congress, which must have been aware of these decisions, has never seen fit to amend FELA to provide for some form of proportionate liability of joint tortfeasors. Given the delicate balance of statutory compensation schemes such as FELA, and the variety of apportionment

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7. *See, e.g., Lockhard v. Missouri Pacific RR*, 894 F.2d 299, 305 (8th Cir. 1990); *Stephens v. Southern Pacific Transportation Co.*, 991 F. Supp. 618, 620 (S.D. Tex. 1998); *Rice v. Cincinnati, New Orleans & Pacific Railway Co.*, 920 F. Supp. 732, 735 (E.D. Ky. 1996); *Mazyck v. Long Island Railroad Co.*, 896 F. Supp. 1330, 1332-333 (E.D.N.Y. 1995); Syllabus Point 1, *Gaulden v. Burlington Northern, Inc.*, 654 P.2d 383 (Kan. 1982); *Narcise v. Illinois Central Gulf Railroad Co.*, 427 So. 2d 1192, 1195 (La. 1983); *Lewis v. National Railroad Passenger Corp.*, 176 Misc.2d 947, 675 N.Y.S.2d 504 (1998); *Denton v. Southern Railway Co.*, 854 S.W.2d 885, 888 (Tenn. Ct. App. 1993).

mechanisms that might be substituted for traditional joint and several liability, any change to the apportionment rules under FELA should come from Congress, rather than the courts.

Contrary to the railroad's assertions, joint and several liability is not an anachronism, but a widely applied doctrine of continuing vitality, not just here but abroad. It is applied not only in FELA cases but in Jones Act cases,[8] general maritime personal injury cases, *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995), Longshoremen's and Harbor Workers' Compensation (LHWC) cases, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), Death on the High Seas Act (DOHSA) cases, *In Re Ocean Foods Boat Co.*, 692 F. Supp. 1253, 1264 (D. Ore. 1988), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) cases[9] and Federal Water Pollution Control Act (FWPCA) cases. *United States v. M/V Big Sam*, 681 F.2d 432, 439 (5th Cir. 1982). In addition, "joint and several liability with

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8. *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1430-32 (5th Cir. 1988); *Joia v. Jo-Ja Serv. Corp.*, 817 F.2d 908, 917 (1st Cir. 1987); *Dicola v. American Steamship Owners Mut. Protection & Indemn. Assn. (In Re Prudential Lines, Inc.)*, 170 B.R. 222, 235 (S.D.N.Y. 1995); *Johnson v. National Steel & Shipbuilding Co.*, 742 F. Supp. 1062, 1065 (S.D. Cal. 1990); *Texaco v. Addison*, 613 So. 2d 1193, 1202 (Miss. 1993).

9. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998); *Ohm Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1579 (5th Cir. 1997); *Rumpke of Indiana v. Cummins Engine Co.*, 107 F.3d 1235, 1240 (7th Cir. 1997); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996); *Price v. U.S. Navy*, 39 F.3d 1011 (9th Cir. 1994); *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993); *O'Neill v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 171-73 (4th Cir. 1988).

contribution has long been the rule in England and almost all other countries, most of which have comparative responsibility liability regimes." Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U. Cal. Davis L. Rev. 1141, 1185 (1988).

As recently as twenty-five years ago, joint and several liability was the rule in every state in the country. *Coats v. Penrod Drilling Corp.*, 61 F.3d at 1130-31. In the name of "tort reform," a number of states have since abandoned or modified traditional joint and several liability, but fifteen states (one more than the number of states using the zone of danger test when *Gottshall* was decided) still retain pure joint and several liability, while twenty other states retain it in a modified or limited form. Restatement (Third) of Torts: Apportionment of Liability § 17, reporter's note at 149 (2000). For example, some states apply joint and several liability when the plaintiff is free of negligence (under which approach respondents would be able to recover), or apply joint and several liability only in certain kinds of cases.[10]

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10. Significantly, some states have enacted legislation expressly retaining joint and several liability in cases involving toxic substances such as asbestos. *See* Haw. Rev. Stat. § 663-10.9(2)(c); *In Re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 818-19 (9th Cir. 1992); Ill. Comp. Stat. § 5/2-1118; *Padgett v. A&M Insulation Co.*, 640 N.E.2d 21, 23-4 (Ill. Ct. App. 1994); N.J. Stat. Ann. § 2A: 115-5.3(d)(1) & (f); *Stevenson v. Keene Corp.*, 603 A.2d 521 (N.J. Super. Ct. 1992), *aff'd, per curiam*, 620 A.2d 1047 (N.J. 1993); Tex. Civ. Prac. & Rem. Code Ann. § 33.013(c)(2); *McNair v. Owens-Corning Fiberglas Corp.*, 890 F.2d 753 (5th Cir. 1989); Wash. Rev. Code § 4.22.070(3)(a); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 728 (Wash. 1989).

Regardless of what rules the state legislatures may choose to apply in tort cases, however, this court must be guided by the intent of Congress when it enacted FELA to shift the cost of industrial injuries and deaths to employers. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 431-32 (1958). Abandoning the rule of joint and several liability in cases where the negligence of multiple tortfeasors results in an indivisible injury would be inconsistent with that goal. Under joint and several liability, the defendant bears the burden of locating and suing other potentially responsible tortfeasors and the risk that some or all of them may be dissolved, insolvent, immune from suit or simply not worth pursuing. Under the rule of several liability advocated by the petitioner, the injured party, even if wholly free of any contributory negligence, would bear those risks and burdens.

## CONCLUSION

The Norfolk Southern's petition for certiorari should be denied.

Respectfully Submitted,

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# APPENDIX

# APPENDIX — ADDITIONAL RELEVANT DOCUMENTS

[Omitted here but submitted separately as Lodging]

(A)

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IN THE

# Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
*Petitioner,*

v.

HOMER DYE, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the Circuit Court of Mingo County, West Virginia**

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## REPLY BRIEF OF PETITIONER

In their brief in opposition, Respondents essentially do not dispute that there is a mature split among the lower courts on the two questions presented by Norfolk & Western Railway Company ("N&W"). Rather, Respondents attempt principally to draw irrelevant legal and factual distinctions to suggest that this case does not implicate those conflicts of authority. Their arguments are unavailing.

1. *Emotional distress.* There is a square conflict among the lower courts as to whether a plaintiff may recover for emotional distress in a FELA action absent some medical or physical manifestation of that distress. Pet. 11-20. Respondents wrongly allege that this split of authority is not relevant to the decision below simply based on the presence in this case of a significant "physical impact" or injury (namely, asbestosis). Opp. 10-11. Their argument is based on a misunderstanding of the distinctions drawn in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), and in the common law.

Many "physical impact" cases in the common law's progress towards the recognition of emotional-distress damages concern what is known in modern parlance as "pain and suffering": *i.e.*, mental harms "stemming *directly* from a physical injury or condition." *Id.* at 544 (emphasis added) (internal quotation marks omitted). For such cases, there was no separate requirement of physical or emotional manifestation of harm; the sole limitation was that any provable damages recovered for mental distress be the "direct and natural result of an injury sustained." *Hetrick* v. *Willis*, 439 S.W.2d 942, 943 (Ky. 1969) (denying recovery where plaintiff's depression not linked to physical injury from auto accident). But this Court in *Gottshall* cordoned off negligent infliction of emotional injury as "apart from the tort law concepts of pain and suffering." 512 U.S. at 544. The Court defined the separate tort of negligent infliction of emotional injury as

"mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and *that is not directly brought about by a physical injury*, but that may manifest itself in physical symptoms." *Id.* (emphasis added).

In *Gottshall*, this Court identified "[t]hree major limiting tests for evaluating claims alleging negligent infliction of emotional distress": the physical-impact test, the zone of danger test, and the relative-bystander test. *Id.* at 546, 547-49. Given the purposes of FELA, this Court adopted the zone-of-danger test, which includes but is not limited to physical impacts: "the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, *or* who are placed in immediate risk of physical harm by that conduct." *Id.* at 547-48 (emphasis added). It was the "physical impact" prong of the zone-of-danger test that this Court addressed in *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424 (1997), deciding that development of an asbestos-related disease was necessary for recovery of emotional-distress damages caused by fear of asbestos-related cancer. *Id.* at 430. There is no doubt that the common law jurisdictions adopting the zone-of-danger test have long required physical or objective manifestation of the claimed emotional injury as a precondition for recovery. *Gottshall*, 512 U.S. at 549 n.11 ("Many jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury."); see Pet. 13-14. Respondents' assertion that the presence of a physical impact eliminates the manifestation requirement has no basis in law.[1]

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[1] Respondents claim that in many jurisdictions fear of cancer claims do not require any manifestation of emotional distress. *See* Opp. 19-20. This would not alter the majority rule, but in any event many of the cited cases explicitly required some manifestation or objective corroboration of the plaintiff's fear of cancer. *See, e.g.*, *Dunn* v. *HOVIC*, 1 F.3d 1362, 1365 (3d Cir. 1993) (allowing recovery for emotional distress where

The split of authority has arisen over whether FELA incorporates the common-law manifestation requirement, and Respondents fail in their attempt to distinguish individual cases within the relevant conflict of authority. For example, Respondents allege that the Fifth Circuit rejected a manifestation requirement for emotional distress claims in *Hagerty* v. *L & L Marine Services, Inc.*, 788 F.2d 315 (5th Cir.), *reh'g en banc denied*, 797 F.2d 256 (5th Cir. 1986). Opp. 10. Respondents, however, ignore the Fifth Circuit's later opinion noting that "a plaintiff may recover damages for *serious* mental distress." *Hagerty* v. *L & L Marine Servs., Inc.*, 797 F.2d 256, 256 (5th Cir. 1986) (emphasis added). Respondents distinguish the decision in *Bullard* v. *Central Vermont Railway*, 565 F.2d 193 (1st Cir. 1977), based solely on the fact that the plaintiff there sought recovery for emotional distress other than fear of future injury. Opp. 10. This distinction is clearly irrelevant to the question presented.

Respondents also attempt to dilute the split of authority by asserting that most of the cases predate the Court's decisions in *Gottshall* and *Buckley*. Again, this argument is clearly without merit because the Court has left this particular question unaddressed. Pet. 14-17. In *Gottshall*, the Court acknowledged the two separate common law "limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable." 512 U.S. at 546. In both *Gottshall* and *Buckley*, the Court addressed only the first limitation through its adoption and application of the

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plaintiff suffered from depression and a "great fear of contracting cancer"), *modified on other grounds*, 13 F.3d 58 (3d Cir. 1993); *Mauro* v. *Owens-Corning Fiberglas Corp.*, 542 A.2d 16, 24 (N.J. Super. 1988) ("[s]ufficient evidence was presented to permit the jury to find plaintiff suffered from serious emotional distress"), *aff'd*, 561 A.2d 257 (N.J. 1989); *Lavelle* v. *Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 481 (Ohio Ct. C.P. 1987) (requiring "a reasonable apprehension [of contracting cancer] which manifests itself in mental distress"); *Denton* v. *Southern Ry.*, 854 S.W.2d 885, 889 (Tenn. Ct. App. 1993) ("Under FELA, a claim becomes compensable when it is manifest.").

"zone of danger" test. *Id.* at 554-56; 521 U.S. at 430. Without any direct treatment of the second limitation, it is irrelevant whether the split of authority arose before or after *Gottshall* and *Buckley*. The relevant conflict is as alive today as before these decisions.

Contrary to Respondents' assertions, this case is the perfect vehicle for addressing the question presented. First, it is difficult to conceive of a case in which a plaintiff could present any less evidence of emotional distress. The only relevant evidence was Respondents' own testimony that they are "aware of," "think[] about," or "worr[y] about" contracting cancer sometime in the future. Opp. 6-7. In their opposition, Respondents merely present a lengthy narrative of the physical limitations on their daily activities, but nothing regarding a manifestation of their "fear" of cancer. *Id.* Respondents otherwise refer to medical testimony that "people with occupational exposure to asbestos, silica and coal dust *should have* real concern about developing cancer." *Id.* at 4 (emphasis added). Again, this testimony does not establish that Respondents actually experienced emotional distress.

Petitioner does not dispute that Respondents are entitled to have a jury determine their pain-and-suffering damages from asbestosis (such as shortness of breath). But those damages could not justify the multimillion dollar judgment awarded; this case was predominantly about fear of cancer. Although they repeat at length the trial testimony that asbestos exposure causes cancer, *id.* at 4-5, Respondents do not contest the uncontradicted evidence that asbestosis is not causally linked to cancer. The emotional injuries they claim, while coincident with the "physical impact" of asbestosis, are not pain and suffering that stems directly from the asbestosis. Rather, the injuries "result[] solely from the internal operation of fright or other emotional disturbance." *Restatement (Second) of Torts* § 436(2) (1965). Under the common-law rules that should govern under FELA, they are compensable only if manifested in a physical or medical condition.

Respondents lastly argue that this case is not a good vehicle because the general verdict form prevents the Court from deciphering the damages awarded for fear of cancer. Opp. 8-9. But the general verdict makes this issue more compelling, not less. The question is whether the judge erred in submitting the fear of cancer claim to the jury at all. See *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919) ("in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury"). Such objections to this Court's review are common in tort cases, and just as commonly rejected by this Court. See, *e.g.*, *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 351 (2000); Br. for Resp't in Opp'n to Pet. for a Writ of Cert. at 8-9, *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000). The question on which the courts are divided is thus cleanly presented by this case and, as underscored by Respondents' clear misreading of *Gottshall* and *Buckley*, merits immediate resolution.

2. *Apportionment.* N&W demonstrated that there is a square decisional conflict on the critical question of apportionment of damages under FELA. Pet. at 20-26. The Court's resolution of this deep and mature conflict is particularly warranted by the rapid changes in the common law in the past few decades on this very issue. See *Restatement (Third) of Torts: Apportionment of Liability* § 17 (2000). Respondents fail to refute this split of authority and common law trend or give any reason to delay review.

As an initial matter, Respondents do not dispute that there were other causes of their injuries, and, contrary to Respondents' assertions, Opp. 1, 9, N&W did present substantial evidence of these other causes of Respondents' injuries. First, two of the five Respondents had substantial exposure to asbestos for extended periods of time at non-railroad employment. *Id.* at 3. Second, three of the Respondents were habitual smokers, and any damages for lung disease and fear of cancer clearly should have been apportioned according to the risks created by smoking and by asbestos exposure. *Id.* at

4, 5. Third, as evidenced by complaints introduced into the record by N&W, Respondents had brought product liability actions alleging that asbestos manufacturers were solely responsible for their injuries. Pet. at 7-8. In fact, Respondents reached actual or contingent settlements with at least *31* other entities for the same injuries for which they were awarded damages here.[2]

Respondents simply cannot distinguish the principal decision with which the decision below is in conflict: namely, *Dale* v. *B&O Railroad*, 552 A.2d 1037 (Pa. 1989). None of the distinctions on which Respondents rely – indivisibility of injury or the presence of multiple tortfeasors – applies to *Dale*. First, *Dale*, like this case, involved indivisible injuries related to asbestos exposure. Second, Petitioner seeks apportionment not just among multiple tortfeasors, but as in *Dale* among the railroad's conduct and independent medical conditions (here, lung disease and fear of cancer attributable to smoking, and in *Dale*, independent lung disease). Third, the holding of *Dale* broadly and properly requires apportionment among the railroad and all other causes, regardless of whether those causes are independent tortfeasors:

> [W]e hold that an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a preexisting condition *or to a concurrent, contemporaneous cause* arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

*Id.* at 1041 (emphasis added). *Dale* unequivocally repudiated joint and several liability as inconsistent with the statutory scheme, in clear conflict with the decision below.[3] Similarly,

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[2] *See* Plaintiffs' Motions for Entry of Judgment Order (Petitioner's Supplemental Lodging Tab A).

[3] Respondents make the inherently implausible claim that a decision of a lower Pennsylvania court has called into doubt the validity of *Dale*.

all but two of the federal appellate decisions rejected joint-and-several liability for indivisible injuries from multiple causes, and are indistinguishable on the grounds which Respondents invoke. See Pet. 22-23.

Most of Respondents' arguments in favor of joint-and-several liability, although erroneous, are relevant only at the merits stage. The critical point is that Respondents, acknowledging that only "fifteen states . . . still retain pure joint and several liability," Opp. 23, do not contest that the recent prevailing and rapid trend in the common law has been away from joint and several liability, even for indivisible injuries. Pet. 25; see also *Restatement (Third) of Torts: Apportionment of Liability* § 17 cmt. a ("The clear trend over the past several decades has been a move away from pure joint and several liability.").[4] Indeed, "the predominant rule for independent tortfeasors who cause indivisible harm is a variety of hybrid schemes, entailing some joint and several liability and some several liability." See *id.* § D18 cmt. b.[5] This disparity in current apportionment methods further warrants the immediate establishment of a uniform standard in the FELA context. See *Dice* v. *Akron, Canton, & Youngstown R.R.*, 342

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Opp. 13 n.2. To the contrary, the lower court relied on its prior decision in *Dale*, apparently unaware that it had been vacated by the Supreme Court on that issue. *See McDermott* v. *Consolidated Rail Corp.*, 768 A.2d 348, 352-53 (Pa. Super. Ct. 2001).

[4] Respondents also argue that N&W failed to join any third-party defendants in the case below, or to make any effort to obtain contribution from any third parties. Opp. 3. Under prevailing common law principles, however, such actions are not necessary – and indeed, duplicative – where damages are apportioned among tortfeasors. *See Restatement (Third) of Torts: Apportionment of Liability* § B19 cmt. c (2000).

[5] Indeed, the Restatement sections cited by Respondents in favor of joint and several liability for indivisible injuries have been expressly superseded. *See Restatement (Third) of Torts: Apportionment of Liability* Parallel Table 2 (noting replacement of *Restatement (Second) of Torts* §§ 433A, 434, 879).

U.S. 359, 361 (1952). Contrary to Respondents' claims, Opp. 21-22, this Court does not usurp Congress's role by fulfilling its statutory "duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law." *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 432 (1958).

This case thus presents a clear vehicle for resolving the conflict among the lower courts.[6] In light of the rapid, definitive movement away from joint and several liability in the past few decades, the Court should establish a uniform standard for the apportionment of damages in FELA actions.

3. *The Realities Of FELA Mass Tort Litigation.* In their opposition, Respondents paint an idyllic picture of the conduct of mass tort litigation in West Virginia and elsewhere. Their assertions, however, reveal the exact opposite: the tactical targeting of pro-plaintiff jurisdictions to take full advantage of extraordinary rulings such as the decision below. It is no accident that 25,000 asbestos suits have been filed in West Virginia, and 2,500 FELA asbestos suits against railroads, Pet. 27, even though fewer than 3,000 railroad employees reside in West Virginia, AAR Br. 8 n.10. The need for uniform FELA standards on these questions could not be more apparent, and denial of certiorari would simply vindicate the strategy of the plaintiff's bar.

Respondents first attempt to downplay the impact of the decision below on future FELA asbestos litigation. Opp. 14. Specifically, Respondents assert that the ruling of the court below could only bear significance on other FELA litigation that is brought in that particular court. In fact, the plaintiff's bar is likely to flock even more often not only to Mingo

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[6] Contrary to Respondents' claims, Opp. 9, the offset by the court below in the amount of settlements with other tortfeasors (which only amounted to $36,549.39) does not affect Petitioner's right to proper apportionment. *Cf.* Final Judgment Orders (Petitioner's Supplemental Lodging Tab B)).

County,[7] but also to other West Virginia courts with the ruling below in hand.[8] To narrow the impact of the decision below to the particular court that rendered it is illusory.

Respondents also exaggerate the availability of appellate review in West Virginia. There is no right of appellate review in West Virginia. *Id.* at 14 n.4. Discretionary review is granted in only 30% of civil cases, *id.* at 15 n.4,[9] but more important is the nature of the cases in which review is denied. Respondents allege that the West Virginia Supreme Court has in the past reviewed FELA and asbestos cases, but the vast majority of cases cited were appeals raised by plaintiffs, not defendant railroads, or cases in which Supreme Court jurisdiction was original. *Id.* at 15 nn.5, 6. Railroads and other major corporations are frequently denied review on critical liability issues, even when there is clear error of law and (as here) the issues are squarely presented. It is the combination of populist juries and the infrequency of appellate review that makes certain jurisdictions in West Virginia irresistible to the plaintiff's bar.

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[7] Mingo County has long been a popular forum for non-resident plaintiffs and out-of-state lawyers. Notably, the Supreme Court of West Virginia wondered why a FELA plaintiff "who lives, worked, was injured and was treated in Tennessee, chose Mingo County, West Virginia for his forum." *Norfolk S. Ry.* v. *Maynard*, 437 S.E.2d 277, 280 n.3 (W.Va. 1993). Indeed, the court implied that the plaintiff's out-of-state lawyer orchestrated a constant flow of FELA lawsuits in Mingo County. *See id.*

[8] For example, the Association of American Railroads as *amicus curiae* refers to a FELA complaint recently filed in West Virginia mostly by non-resident named plaintiffs on behalf of a class of "'several hundred to several thousand workers,'" alleging toxic exposures and related risks of cancer. AAR Br. 6 n.7.

[9] Respondents' comparison of the percentage of cases reviewed by the West Virginia Supreme Court and the highest courts of other states is misleading. Opp. 15 n. 4. The vast majority of states have intermediate appellate courts, and therefore guarantee at least some appellate review.

Respondents also allege that West Virginia courts have dismissed FELA complaints on the grounds of *forum non conveniens*. Respondents support this assertion with the lodging of 15 dismissals in the past ten years. But seven of these orders were from a single county (McDowell County), and most dismissed cases were filed only by non-resident plaintiffs. By contrast, only one of these dismissals (from 1991, no less) was issued by the Circuit Court of Mingo County, which this year alone has denied two *forum non conveniens* motions in FELA cases involving non-resident plaintiffs.[10] Moreover, success on a *forum non conveniens* motion is often uncertain where the challenge is to alleged corporate negligence in failing to protect workers generally from occupational risks. Respondents' lodging at most illustrates that the courts of West Virginia sporadically dismiss FELA cases on grounds of *forum non conveniens*.

More importantly, the overriding significance of these rulings is crystal-clear: that the plaintiff's bar targets pro-plaintiff jurisdictions such as West Virginia for the filing of FELA cases on behalf of thousands of resident and non-resident plaintiffs. Pet. 27-28. Now that the court below has ruled that multimillion dollar judgments are proper for any plaintiff with asbestos-related symptoms without a showing of any severe emotional injury, and denied apportionment, there can be no doubt that the West Virginia courts will be the principal locus for FELA litigation against the major Eastern railroads.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[10] Orders Denying Motion to Dismiss on Grounds of *Forum Non Conveniens* (Petitioner's Supplemental Lodging Tab C).

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